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CIS

CONFIRMATION OF FEDERAL JUDGES

HEARINGS

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

FIRST SESSION

ON

THE SELECTION AND CONFIRMATION OF FEDERAL JUDGES

NOVEMBER 13, 20, AND 25; DECEMBER 4, 11, AND 14, 1981

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CONTENTS

Friday, November 13, 1981

STATEMENTS OF SPONSORS

Page
D'Amato, Senator Alfonse M 1
Pressler, Senator Larry 2
Rousselot, Representative John H 3
Exon, Senator J. James 6
Zorinsky, Senator Edward 6
Abdnor, Senator James 12
Denton, Senator Jeremiah 16
Heflin, Senator Howell 18

OTHER STATEMENTS

Koegler, Lillian P 34
Blockinger, Melvin 42
Blecker, Robert 45

TESTIMONY OF NOMINEES

Pierce, Lawrence W 7
Cox, Emmett Ripley 17
Beam, Clarence A 26
Jones, John Bailey 28
Hall, Cynthia Holcomb 30

PREPARED STATEMENTS AND OTHER SUBMISSIONS

Abdnor, Senator James 14
Blecker, Robert:
    Phillip v. *Smith* 53
    Cobb v. *Beame* 61
Cox, Emmett Ripley:
    Response to committee query 23
    Additional remarks 24
D'Amato, Senator Alfonse 2
DeConcini, Senator Dennis, letter of Representative John LeBoutillier 32
Heflin, Senator Howell 20
    Letter, from C. C. Torbert, Jr., to Senator Strom Thurmond 22
Koegler, Lillian P 37
    Memorandum of Robert Blecker and Robert P. Salvia 40
Rousselot, Representative John H 4
Biographies 50

Friday, November 20, 1981

STATEMENTS OF SPONSORS

Percy, Charles H 69
Hawkins, Senator Paula 71

Page
Chiles, Senator Lawton M 72
Shaw, Representative Clay 73
Warner, Senator John W 74
Parris, Representative Stan 75
Quayle, Senator Dan 76
Thurmond, Senator Strom 83
Hollings, Senator Ernest F 84
Campbell, Representative Carroll 86
deLugo, Delegate Ron 87

TESTIMONY OF NOMINEES

Eschbach, Jesse E 88
Posner, Richard A 90
Hamilton, Clyde H 92
Moore, John H. II 94
Cacheris, James C 97
O'Brien, David V 98

PREPARED STATEMENTS AND OTHER SUBMISSIONS

Byrd, Senator Harry F., Jr 75
Hollings, Senator Ernest F 85
Lugar, Senator Richard G 81
Napier, Representative John L 84
Percy, Senator Charles H., curriculum vitae of Richard A. Posner 71
Quayle, Senator Dan 78
    Letter from Donald D. Doxsee 80
Biographies 102

WEDNESDAY, NOVEMBER 25, 1981

STATEMENTS OF SPONSORS

Heinz, Senator John 105
Specter, Senator Arlen 115
Warner, Senator John W 116

TESTIMONY OF NOMINEES

Becker, Edward R 118
Doumar, Robert G 122
Kiser, Jackson L 123

OTHER SUBMISSIONS

Heinz, Senator John:
  Articles:
    "Third Circuit," by Robert Windrem, from the American Lawyer, July 1980 106
    "Judge Becker Cuts 11-Year Monster Down to Size," by Larry Lempert, from Legal Times of Washington, May 11, 1981 107
    Richard Mackensworth v. *American Trading Transportation Co.*, opinion and order of Judge Edward R. Becker 111
Biographies 126

FRIDAY, DECEMBER 4, 1981

STATEMENTS OF SPONSORS

Glenn, Senator John 127
Metzenbaum, Senator Howard 129
Weicker, Senator Lowell, Jr 130
Dole, Senator Bob 131
Mattingly, Senator Mack 132
Nunn, Senator Sam 133

Page
Moynihan, Senator Daniel Patrick 134
D'Amato, Senator Alfonse M 135
Kasten, Senator Robert, Jr 136
Proxmire, Senator William 138

OTHER STATEMENTS

Olson, Lieutenant Governor Russell 186
Ceci, Circuit Judge Louis J 187

TESTIMONY OF NOMINEES

Winter, Ralph K., Jr 171
Crow, Sam A 176
Forrester, J. Owen 177
Krenzler, Alvin I 179
Glasser, Israel Leo 180
Shabaz, John C 182

PREPARED STATEMENTS AND OTHER SUBMISSIONS

- D'Amato, Senator Alfonse M 135
- Dole, Senator Robert 132
- Kassebaum, Senator Nancy Landon 132
- Kasten, Senator Robert, letter from Wisconsin Chief Justice Bruce F. Beilfuss. 137
- Nunn, Senator Sam 134
- Proxmire, Senator William 158
  - Letter from Thomas G. Ragatz 166
  - Minority report from Federal Judicial Nominating Commission 167
- Thurmond, Senator Strom:
  - Letters from:
    - Wisconsin Governor Sherman Dreyfus 141
    - U.S. Representatives:
      - Steve Gunderson 142
      - Thomas E. Petri 143
      - Toby Roth 144
      - F. James Sensenbrenner, Jr 145
    - Wisconsin State Legislature:
      - Senate chamber 146
      - Representative chamber 147
    - Wisconsin court judges:
      - John F. Buckley 148
      - George A. Burns, Jr 149
      - Louis J. Ceci 150
      - Robert M. Curley 151
      - Leander J. Foley, Jr 152
      - Hugh R. O'Connell 153
      - Clarence R. Parrish 154
      - Harry G. Snyder 155
      - Clair Voss 156
- Winter, Ralph K.:
  - Letters:
    - To Judge Howard T. Markey 174
    - From Judge Howard T. Markey 175
- Biographies 188

FRIDAY, DECEMBER 11, 1981

STATEMENTS OF SPONSORS

McClure, Senator James A 192
Symms, Senator Steve 192
Nickles, Senator Don 193
Boren, Senator David L 194
Warner, Senator John W 195

TESTIMONY OF NOMINEES

Page
Ryan, Harold L ... 196
Russell, David L ... 199
Archer, Glenn L., Jr ... 200

PREPARED STATEMENTS AND OTHER SUBMISSIONS

Archer, Glenn L., Jr., letter to committee chairman, Senator Strom Thurmond ... 204
Warner, Senator John W ... 195
Biographies ... 207

MONDAY, DECEMBER 14, 1981

STATEMENT OF SPONSOR

Mathias, Senator Charles McC ... 212

TESTIMONY OF NOMINEE

Harris, Stanley S ... 209

OTHER STATEMENT

Drake, Ronald L ... 217

PREPARED STATEMENT AND SUBMISSION

Drake, Ronald L ... 221
Thurmond, Senator Strom, letter from J. George Frain, secretary, the Eighteenth & Columbia Road Business Association ... 224
Biography ... 225

ALPHABETICAL LISTING OF NOMINEES FOR FEDERAL APPOINTMENTS

Archer, Glenn L., Jr. (Assistant Attorney General, Tax Division, DOJ) ... 200
Beam, Clarence A ... 26
Becker, Edward R ... 118
Cacheris, James C ... 97
Cox, Emmett Ripley ... 17
Crow, Sam A ... 176
Doumar, Robert G ... 122
Eschbach, Jesse E ... 88
Forrester, J. Owen ... 177
Glasser, Israel Leo ... 180
Hall, Cynthia Holcomb ... 30
Hamilton, Clyde H ... 92
Harris, Stanley S. (U.S. attorney, District of Columbia, DOJ) ... 209
Jones, John Bailey ... 28
Kiser, Jackson L ... 123
Krenzler, Alvin I ... 179
Moore, John H. II ... 94
O'Brien, David V ... 98
Pierce, Lawrence W ... 7
Posner, Richard A ... 90
Russell, David L ... 199
Ryan, Harold L ... 196
Shabaz, John C ... 182
Winter, Ralph K., Jr ... 171

CONFIRMATION HEARING ON:

LAWRENCE W. PIERCE, JOHN BAILEY JONES, CYNTHIA HOLCOMB HALL, CLARENCE A. BEAM, AND EMMETT RIPLEY COX

FRIDAY, NOVEMBER 13, 1981

U.S. Senate,
Committee on the Judiciary,
Washington, D.C.

The committee met, pursuant to notice, at 2:10 p.m., in room 2228, Dirksen Senate Office Building, Senator Paul Laxalt (acting chairman of the committee) presiding.

Present: Senators Heflin and DeConcini.

Staff present: Duke Short, chief investigator; Allan Spence, investigator; Bill Christenson, investigator; and Pamela Swanner, clerk.

Senator Laxalt [acting chairman]. Will the committee please be in order.

NOMINATION OF LAWRENCE W. PIERCE, EMMETT RIPLEY COX, CLARENCE A. BEAM, JOHN BAILEY JONES, AND CYNTHIA HOLCOMB HALL

I am pleased today to have before the committee Judge Lawrence W. Pierce of New York, who has been nominated for the position of circuit judge for the Second Circuit Court of Appeals; Mr. Emmett Ripley Cox of Alabama, to be U.S. district judge for the Southern District of Alabama; Mr. Clarence A. Beam of Nebraska, to be U.S. district judge for the District of Nebraska; Judge John Bailey Jones of South Dakota, to be U.S. district judge for the District of South Dakota; and Judge Cynthia Holcomb Hall of California, to be U.S. district judge for the Central District of California.

We have several of our colleagues present who wish to speak in behalf of the nominees and we have a vote on, as usual. We will do the best we can. I think perhaps, since we have Senator D'Amato seated at the table, we will commence with him.

Welcome, Senator.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'Amato. Thank you very much, Mr. Chairman.

I am most pleased to introduce to the committee Judge Lawrence W. Pierce.

Senator Laxalt. Before you continue, will you come forward, Judge Pierce, to be seated beside your Senator?

How long is your presentation?

Senator D'AMATO. It will not do the judge justice but it will be very short. I would say 40 seconds.

Senator LAXALT. Very well. Proceed.

Senator D'AMATO. I am pleased to introduce to the committee, Mr. Chairman, Judge Lawrence W. Pierce, who has been nominated by the President of the United States to the Second Circuit Court of Appeals. Judge Pierce is presently serving as a district judge for the Southern District of New York, to which he was appointed by President Nixon in 1971.

He is a graduate of Fordham University Law School. He has held numerous criminal law positions in New York, including assistant district attorney for Kings County, deputy commissioner of the New York City Police Department, chairman of the New York State Narcotics Addiction Control Commission, just to mention several.

In 1979 he was appointed a member of the U.S. Foreign Intelligence Surveillance Court by Chief Justice Burger. Judge Pierce has also served on a number of commissions of great prominence, including the President's Task Force on Prisoner Rehabilitation, the ABA Commission on Correctional Facilities and Services, and the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Litigation. He was previously engaged in the practice of law from 1952 through 1961.

Mr. Chairman, it is a great privilege and pleasure for me to have the opportunity, the occasion, and the honor to present Judge Pierce to this committee for its consideration.

Senator LAXALT. I thank you, Senator.

[The prepared statement of Senator D'Amato follows:]

PREPARED STATEMENT OF SENATOR ALFONSE M. D'AMATO

Mr. Chairman, I am pleased to introduce to the committee Judge Lawrence W. Pierce who has been nominated by the President for the Second Circuit Court of Appeals.

Judge Pierce is presently U.S. District Judge for the Southern District of New York, to which he was appointed by President Nixon in 1971.

A graduate of Fordham University School of Law, he held several posts relating to criminal law in New York, including assistant district attorney for Kings County, deputy commissioner of the New York City Police Department, and chairman of the New York State Narcotics Addiction Control Commission.

In 1979, he was appointed, a member of the U.S. Foreign Intelligence Surveillance Court by Chief Justice Burger.

Judge Pierce has also served on several commissions, including the President's task force on Prisoner Rehabilitation, the ABA Commission on Correctional Facilities and Services and, the Second Circuit Commission on the Reduction of Burdens and Costs in Civil Legislation.

He previously engaged in the practice of law from 1952-61.

It is a pleasure to present Judge Pierce to this committee for its consideration.

Senator LAXALT. I think perhaps now it might be well if we proceed. Would you like to proceed, Senator Pressler? I think we have enough time.

STATEMENT OF HON. LARRY PRESSLER, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator PRESSLER. Mr. Chairman, I take great pride in presenting to the committee John Bailey Jones of South Dakota. Seldom has an appointment been praised so much in our State. He has had wide experience as a county judge, in private practice, as a State representative—a member of our State house of representatives—a graduate of the University of South Dakota Law School. He is married, with six children. He is one of the most outstanding members of our State and he was selected by a 10-member committee that Senator Abdnor and I organized. I present him with great pride.

I described him as one of the finest trial judges in our State. Seldom has an appointment received so much praise from across the State, from laymen, lawyers, and others in our State. We are very proud of him and very pleased to present him to the committee.

Senator LAXALT. Thank you very kindly, Senator Pressler.

I think perhaps at this time, if it is acceptable, John, do you want to proceed? I know you are busy on the other side.

I apologize to all present for the manner in which we have to conduct these hearings. Unfortunately we are taking votes and we attempt to wedge our committee business in between.

Congressman Rousselot.

STATEMENT OF HON. JOHN H. ROUSSELOT, A U.S. REPRESENTATIVE FROM THE STATE OF CALIFORNIA

Congressman ROUSSELOT. Mr. Chairman, Senator Laxalt, this is Cynthia Holcomb Hall, who has served as a tax court judge and has had so many fine positions that I will not take time to enumerate them all. I just tell you that she comes not only highly recommended but extremely competent in all of the ways she has served in the judiciary, which is many, many.

Therefore, I will just ask unanimous consent that my statement be made part of the record at this point and you will have a chance to review it, I am sure, but I know you may have a vote.

Senator LAXALT. Without objection, it is so ordered.

Congressman ROUSSELOT. I can assure you she will make an excellent judge because she has already done it in many other ways.

Senator LAXALT. Thank you, Congressman.

[The prepared statement of Representative Rousselot follows:]

PREPARED STATEMENT OF REPRESENTATIVE JOHN H. ROUSSELOT

Mr. Chairman, members of the Judiciary Committee, and honored guests. It is not every day that a member of the other chamber is given the opportunity to address you concerning such an excellent nominee for the Federal Judiciary.

At the additional request of Senator Hayakawa it is my pleasure to introduce to you today a constituent of mine from Pasadena, California, the honorable Cynthia Holcomb Hall, judge of the United States Tax Court, who has been nominated by the President of the United States to serve as a U.S. District Judge in the Central District of California.

Judge Hall is a native of Los Angeles with two children and four step-children. She received her A.B. degree from Stanford University in 1951. During the Korean War she was an Ensign and then Lieutenant (j.g.) in the U.S. Naval Reserves, assigned to the Bureau of Naval Personnel and the Office of the Navy Judge Advocate General here in Washington, D.C.

After the war she returned to Stanford to receive her LL.B. in law school. Six years later she received her LL.M. degree in taxation from New York University Law School. In 1954 Judge Hall was admitted to the Arizona State Bar followed in 1956 by the California State Bar.

She served as a law clerk to Judge Richard Chambers of the U.S. Court of Appeals for the Ninth Circuit in 1954 and 1955. Taking the next six years to raise a family, Judge Hall served on a pro bono publico basis with Legal Aid in Phoenix, Arizona, and served as a referee in the Juvenile Court in Phoenix. In 1959, she practiced as a sole practitioner for six months in Scottsdale, Arizona -- prior to attending New York University Law School. During this time she handled several criminal cases which were assigned to her by the U.S. District Court and the Maricopa County Superior Court.

From September of 1960 to 1964, Judge Hall was a trial attorney with the Tax Division of the Department of Justice in Washington, D.C. Following this, she served for two years as an attorney-advisor for the Office of Tax Legislative Counsel with the Treasury Department.

In 1966 Judge Hall entered private practice back in Beverly Hills, California, with the firm of Brawerman & Holcomb (Holcomb being her maiden and professional name). Her emphasis during these years was on state and federal tax law, but she also did considerable work in corporate, probate, real estate, partnership and other general law areas.

She left private practice in August of 1972, when she was appointed by President Nixon for a fifteen-year term as a Judge on the U.S. Tax Court where she now serves.

Judge Cynthia Holcomb Hall's previous record as a judge reflects her sound judicial philosophy as well as a strong reputation for fairness and a very high degree of competency. In addition, her years as a trial attorney here in Washington, and many years in private practice, all combine to give her a well-rounded background which would allow her to be effective immediately as a U.S. District Judge.

Judge Hall is held in very high esteem by the Bar Association and has earned an excellent reputation for being very effective in the courtroom, having a good judicial temperament as well as being hardworking and conscientious.

All of these qualities make her a candidate that I recommend very highly for the U.S. District Court in Los Angeles.

Thank you Mr. Chairman.

Senator LAXALT. We will stand in recess now for the next few minutes so that we can go vote. The nominees and others interested will kindly excuse us.

[Brief recess.]

Senator LAXALT. I notice that my colleague, Senator Exon, is here. Would you like to be heard?

Senator EXON. Yes, I would, sir.

Senator LAXALT. Step forward, please.

STATEMENT OF HON. J. JAMES EXON, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator EXON. Mr. Chairman, thank you very much.

I am here today for the very distinct privilege of introducing to this committee and giving my unqualified recommendation of the man sitting on my right, Mr. Arlen Beam, who has been nominated by the President. Certainly his record is before the committee so I will not dwell upon that in any great detail.

I wish simply to say that I have known Mr. Beam as an outstanding member of the bar and an outstanding civic member of Lincoln, Nebr., for I guess 20, 25, or maybe 30 years. He comes with the highest character both from the standpoint of his civic pride and the contribution that he has made to Lincoln, Nebr., and the State of Nebraska as a whole. I happen to know that he is held in high esteem by everyone that has known him over the years.

He is a graduate of the University of Nebraska and is a native Nebraskan, and I enthusiastically endorse the nomination that the President has made. When I first heard of the nomination I thought the President had made a good choice, and I was frankly looking forward to the day that I could come here, Mr. Chairman, and be with him to introduce him to this committee.

I know nothing in his whole background that would not allow me to endorse him enthusiastically for this position. As a caveat and off the record, I would like to add that the only possible shortcoming in his character is that he is a Republican and an active one, but he has been a good one. Since it has been my experience, Mr. Chairman, that basically those that become involved with the law are members of the other party, therefore I think it would be most appropriate indeed for a man with the background and experience of Arlen Beam to be the judge of his peers when they come before his court.

Senator LAXALT. I thank the Senator.

Senator EXON. Could I inquire, are there any questions of Mr. Beam at this time or does he have to fall in place in line?

Senator LAXALT. I think that he will have to fall in place even though he is a good Republican. [Laughter.]

You see, there is some fairness.

I believe that my colleague, Senator Zorinsky, was planning on coming back. He is here.

Senator Zorinsky.

STATEMENT OF HON. EDWARD ZORINSKY, A U.S. SENATOR FROM THE STATE OF NEBRASKA

Senator ZORINSKY. Thank you, Mr. Chairman.

Mr. Chairman, the late Tom C. Clark liked to point out that justice is everybody's business and it affects each individual's fireside, and passes on his property, reputation, liberty, and life.

Mr. Chairman, it is for that reason that I am pleased to be here today to introduce C. Arlen Beam, the nominee for the U.S. district court in my home State of Nebraska. Mr. Beam is a product of our State schools and he has lived in Nebraska virtually all his life. He has practiced law in Lincoln, our State capital, for more than 15 years. He served 3 years in the Army in the 1950's and also knows something of our chief Nebraska industry, having worked for Nebraska Farmer magazine and Steckley Hybrid Corn Co. in Lincoln before being admitted to the bar.

Mr. Chairman, I am a small businessman by profession, not a lawyer, but from my vantage point as a Nebraska resident and officeholder, Arlen Beam has the kind of background that will foster good, commmonsense justice in our State. I am proud to present him to you and I would hope that the committee would concur in his nomination.

Thank you, Mr. Chairman.

Senator LAXALT. Thank you, Senator.

I do not see any other Senators here for the moment. I know that Senators Heflin and Denton from Alabama have reserved time but perhaps since they are not now here and still on the floor, we will proceed a bit out of order and commence our questioning with Judge Pierce.

Judge, would you like to step forward to the witness table?

May I swear you in, Judge?

Judge PIERCE. Yes, sir.

Senator LAXALT. Do you solemnly swear that the statement you are about to give is the truth, the whole truth, and nothing but the truth, so help you God?

Judge PIERCE. I do.

Senator LAXALT. Do you have any family members that you would like to introduce to the committee?

Judge PIERCE. Yes, Mr. Chairman. I would like very much to present my wife, Cynthia Pierce, who is herself an attorney and works here in the city of Washington.

Senator LAXALT. Welcome, Mrs. Pierce.

TESTIMONY OF JUDGE LAWRENCE W. PIERCE, NOMINEE, CIRCUIT JUDGE, SECOND CIRCUIT COURT OF APPEALS

Senator LAXALT. Now, Judge, if I may I would like to ask you a few questions that have been posed to us.

In 1975 in the case of *Cobb* v. *Beame* you granted relief to the plaintiffs in the form of a preliminary injunction enjoining the city of New York from enforcing an ordinance which required the displaying of the American flag at certain types of assemblies and parades.

Do you recall the decision?

Judge PIERCE. I do, sir.

Senator LAXALT. Would you briefly describe your ruling in this case for the record?

Judge PIERCE. Yes. It involved a political party which claimed to be undergoing harassment by New York City police in the preelection period. There is an ordinance, a 1917 ordinance, in New York City which requires as a condition of the conduct of a parade or a public assembly the flying of an American flag of certain dimensions.

This organization was not flying that flag, and they were the subject of a police inquiry. Some of their members, two in this case, were served with a summons. The issue before me, the initial issue, was whether the New York City ordinance which required the flying of the American flag as a condition of assembly or as a condition of public speech was constitutional.

I recently read that decision and wended my way through the various issues which had to be addressed, and arrived at the conclusion as stated therein that the city of New York could no more require the flying of a flag as a condition of public assembly or public speech than they could require a newspaper in New York City to publish an imprint of the American flag on its masthead as a condition of publication. I struck down the ordinance.

Senator LAXALT. Therefore, you came down in your decision on purely constitutional grounds.

Judge PIERCE. Yes, sir.

Senator LAXALT. Was your decision appealed?

Judge PIERCE. No, it was not, Mr. Chairman.

Senator LAXALT. Tell me, Judge, if that case had been brought before you for the first time in 1981 rather than in 1975, would you have ruled any differently?

Judge PIERCE. No, sir.

Senator LAXALT. There are no intervening facts or law that would have caused you to rule in any different fashion?

Judge PIERCE. I think the law is the same today as it was then, Mr. Chairman.

Senator LAXALT. Particularly since you came down on constitutional grounds.

Judge PIERCE. I had no choice, as I saw it, but to rule on the constitutional question.

Senator LAXALT. Was that ruling done in accordance with an interpretation of the State constitution or the Federal Constitution or both?

Judge PIERCE. It was the Federal Constitution, even though it involved a New York City ordinance, and it was the first amendment that was of particular concern.

Senator LAXALT. After you granted the preliminary injunction, did any subsequent legal action take place? You said that there was no appeal. Was there anything else that occurred?

Judge PIERCE. Only the submission of a permanent injunction, a proposed permanent injunction which I signed. The initial order was a preliminary injunction.

Senator LAXALT. Yes. Well, that came as a matter of course after you ruled.

Judge PIERCE. That is correct.

Senator LAXALT. Now in 1980 in the case of *Phillips* v. *Smith,* you granted habeas corpus relief to a petitioner who had been convicted of murder in the State court on the ground that there was an implied bias on the part of a juror who had an application for employment as a criminal investigator filed with the office that prosecuted the case.

I assume you recall this?

Judge PIERCE. I do.

Senator LAXALT. Can you describe this as well?

Judge PIERCE. Yes, Mr. Chairman. The case involved a murder trial which went on for a number of weeks. Two weeks before the matter was submitted to the jury for deliberation, it came to the attention of the prosecutor that a member of the jury had applied for a position as an investigator in the major felony unit of the district attorney's office.

The facts disclosed that this juror applied after becoming a juror and assiduously sought to gain that employment while serving as a juror. The prosecutor, for reasons best known to himself, chose not to bring that to the attention of the trial judge and chose not to bring it to the attention of the defense attorney although, had he done so, the trial judge would have had the option of having that juror step down and using one of the three alternates who remained on that jury and could have been used. After the jury deliberated and returned a verdict of guilty, the matter was disclosed to the trial judge for the first time.

Now, I really think that it is a difficult case. I deliberated for 9 months on this case, and if I can read to you a brief section from my opinion, quoting from an 1807 opinion of Chief Justice John Marshall in which he states:

> The end to be obtained is an impartial jury. To secure this end, a man is prohibited from serving on it whose connection with a party is such as to induce a suspicion of partiality. The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case; and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice.

My decision was appealed. The court of appeals for the second circuit, in a 2 to 1 opinion, affirmed my ruling. The matter then moved to the U.S. Supreme Court where a writ of certiorari was granted, and I believe the case was argued last Tuesday before that Court.

Senator LAXALT. Why did you not seek to refer the case to a U.S. magistrate for the purpose of holding an evidentiary hearing?

Judge PIERCE. An evidentiary hearing, a very thorough evidentiary hearing had already been held by a respected State court judge, and there was nothing further to be heard as far as I was concerned. I adopted his findings.

The State court judge did not address the question of what Chief Justice Marshall referred to essentially as implied bias. He addressed the question of actual bias. He found no actual bias. As Chief Justice Marshall says, a person may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving, all in the interests of providing the most basic of rights, that is, an impartial jury to try an accused, especially in capital cases.

Senator LAXALT. Was the doctrine of implied bias affirmatively plead in the petition for habeas corpus? Was it affirmatively plead, or do you recall?

Judge PIERCE. I do not recall.

Senator LAXALT. Do you feel that it is unusual for a Federal court to use the doctrine of implied bias in a case such as this to overturn the decision of a State court?

Judge PIERCE. I think that it is something that is rarely done, apt not to occur very often. In fact, most interestingly, in preparation for this hearing I went back through all of my habeas cases for the past 10 years and to my surprise found that this is the only habeas I have ever granted in 10 years, I found that in all of those other matters, decided on a case-by-case basis, there was not a sufficient basis to grant the writ and I sustained the action by the State trial judge.

Senator LAXALT. Tell me, Judge, in your view does a finding of implied bias demand a grant of the writ of habeas corpus?

Judge PIERCE. I think that it does if it is of this type: Where a person serving on a jury in a criminal case seeks the favor of a prosecuting attorney who is an important part of that case, I think that is probably an infected jury. The concept of a fair trial I think is probably seriously affected.

Senator LAXALT. Theoretically, is it not possible that in every criminal case if sufficient facts were shown, a showing of implied bias on the part of a juror could be made?

Judge PIERCE. Yes, but I do not think that that would be at all fatal unless it was demonstrated that there was something more serious to the matter.

For example, the issue has been raised in the past as to whether governmental service should disqualify a person from serving on a jury where the Government is a party to the suit. It has been clearly held that that is no bar at all to service on a jury, impartial service on a jury.

This case is more in the nature of the situation where the prosecutor and the defense attorney find that there is someone serving on the jury who is affianced to the prosecutor's sister or is a distant cousin, particularly in some small community where all the cousins know each other. That is the type of thing I think Chief Justice Marshall was speaking about which must be reckoned with.

Here again, the situation need never have arisen had the prosecutor simply chosen to inform the judge—if not his opponent—that this was the case, in light of the fact that there were three alternate jurors, any one of whom could have been moved into place.

Senator LAXALT. Has anything developed since this trial to indicate why the prosecutor did not make the revelation?

Judge PIERCE. Well, the prosecutor said that on the voir dire it had been disclosed that the man had made known that he was interested in law enforcement work, and he felt that that was sufficient even though at that time there was no indication that the juror had an interest in that particular prosecutor's office. It was not until he was sworn as a juror that the juror learned of the vacancy, actively sought and received an application, submitted it, and sought very diligently to follow up on it while all the while serving as a juror in that case.

Senator LAXALT. You know, in reviewing this record I have been at a little bit of a loss as to why the theory was implied bias at all.

It seems to me by what you state factually a rather strong case could be made for actual bias. Did that ever occur to you during the course of the pleadings or thereafter?

Judge PIERCE. It occurred to me but I really saw it as a case where I had to determine whether we really mean it when we say that while our goal is to achieve justice, we are equally concerned with the perception of justice. I saw this as a case coming down clearly in the area of the perception of justice.

Senator LAXALT. Does that then cause you to believe that for the purpose of Federal habeas corpus, in each and every case in which sufficient facts materialize for such a showing of implied bias—and to add what you have just said, or an appearance of implied bias—that the writ should be granted?

Judge PIERCE. I believe that if the relationship is one which logically, rationally, and reasonably would lead one to conclude that the accused person cannot receive a trial by an impartial jury, that the same result would have to occur. The issue I believe is fundamentally that of an impartial jury.

Senator LAXALT. Aren't you flirting a bit, then, with judicial activism?

Judge PIERCE. I had not perceived it as that. I have never thought of myself as a judicial activist. I handled that case with as much care and sincerity and honesty of purpose as I could muster. I spent 9 months with it, deliberating it, studying it, challenging my own views of it over and over again. I continued over and over to come out with the same result.

Fortunately, the appellate process is available to review what district judges do. Two of the three judges on the panel which reviewed this case agreed. We will have to await the action of the U.S. Supreme Court, which may feel quite differently about it. I realize that.

Senator LAXALT. All right.

I note that your wife is an attorney with the U.S. Department of Transportation. Would it be appropriate, in your opinion, for you to hear a case in which that department is a party?

Judge PIERCE. No, Mr. Chairman, and, in fact, that issue has already arisen in at least one instance where I have recused myself.

Senator LAXALT. Now, on May 12, 1981, the court of appeals in Albany, N.Y., overturned the conviction of a man who sold films depicting naked children performing sexual acts. On May 23, 1981 an article appeared in The Washington Post reporting the reversal, and stated:

> To be deemed illegal, the court said that pornography must be declared obscene by community standards. The court said that depicting naked children, even engaging in sexual acts, does not necessarily make a movie obscene.

Judge Pierce, what are your views on the law relating to child pornography?

Judge PIERCE. I am not familiar with that particular State law, but the issue does come up over and over again in these various cases we receive under *United States* v. *Miller*, which involves the importation of films into this country from abroad. Of course, they are seized when their wrappers are recognized and we thereafter must have hearings and make findings.

Time and again I have encountered exhibits which involve pornographic photographs of children engaged in some type of proscribed behavior. In each of those instances I have granted the Government's application that they be seized and destroyed.

Senator LAXALT. Lastly, Judge, are the present laws adequate in your opinion to meet the challenge of vigorous enforcement in this field?

Judge PIERCE. The pornography field?

Senator LAXALT. Yes.

Judge PIERCE. I have not been inclined to think so, but then the only cases which I receive are those which come in via the importation route. That leaves unaddressed, at least from our point of view, what occurs on the streets, which is a matter that does not come to us.

I believe it is a very serious matter. I know that various hearings have been held by various committess of the Congress. One would hope that their inquiry is relentless in trying to find some means of stemming the flow of this type of material.

Senator LAXALT. Judge, I think that is all we have. We may have some followup by members of the committee, although I do not think so. I thank you for your very forthright answers to some rather difficult questions.

Judge PIERCE. May I express my thanks to the President for the confidence he has demonstrated in sending my name for nomination, and to you, Mr. Chairman, and the members of this committee for the courtesy of permitting me to be here today.

Senator LAXALT. Thank you, sir.

Judge PIERCE. With your permission, I will withdraw.

Senator LAXALT. Yes.

Senator PRESSLER. Thank you.

Senator LAXALT. I noticed during the course of the testimony that some of my colleagues have come into the room, and perhaps in the interests of time now we could have them come forward and make their presentations.

Senator Abdnor, are you prepared to come forward and speak?

STATEMENT OF HON. JAMES ABDNOR, A U.S. SENATOR FROM THE STATE OF SOUTH DAKOTA

Senator ABDNOR. Thank you, Mr. Chairman and members of the committee. I am sorry we have all these interruptions going on with the bells and the voting but this is a real, unique personal privilege for me to join in with my senior colleague, Senator Pressler, in presenting to this committee Judge John Bailey Jones, who has been nominated by the President to the position of U.S. district judge for the District of South Dakota.

John Jones and I grew up as neighbors in Lyman County, S. Dak. We served in the South Dakota State Legislature together, he in the house of representatives and myself in the senate. I would just like to say that John's personal integrity, his honesty, his sense of personal responsibility, his diligence, his dedication, his high regard for the law, and particularly his unique understanding of people and their problems are among his very special attributes, and I could not say that more sincerely.

When the judicial qualifications committee examined the qualifications of, I think it was 17 potential nominees for this position on the Federal bench, one of those was John Jones. He was one of those that was recommended and he was ultimately selected.

This choice was greeted with rare unanimity from members of the judiciary, the legal profession, the press, Republicans and Democrats alike, and even among them others aspiring to the Federal bench. I have letters from them commending our candidate, the man who was nominated.

I might just say that U.S. District Judge Fred Nichols was quoted as saying—he is retiring—he said, "Every word I have ever heard of Judge Jones has been good. I welcome him to the Federal judiciary." He has been called a "judge's judge" in print back home, a "top flight choice" by others. It was said, "He has a reputation of ability and fairness and personal integrity beyond reproach." Another quote: "A gratifying choice on merit and qualifications and not for political reasons." Another one: "A great credit to the legal profession and to the bench." These are just typical comments that appeared after the announcement that he had been selected for the judgeship.

Therefore, I am very proud to recommend Judge John Jones for Federal district court judge for South Dakota.

Mr. Chairman, I have a longer statement, and I would like unanimous consent to put it in the record.

Senator LAXALT. Without objection, so ordered. I thank you, Senator.

[The prepared statement of Senator Abdnor follows:]

PREPARED STATEMENT OF SENATOR JAMES ABDNOR

THANK YOU VERY MUCH, MR. CHAIRMAN.

IT IS A UNIQUE PERSONAL PRIVILEGE FOR ME TO JOIN WITH MY DISTINGUISHED SENIOR COLLEAGUE, SENATOR PRESSLER, IN PRESENTING TO THE COMMITTEE MY LIFELONG FRIEND, JUDGE JOHN BAILEY JONES, WHO HAS BEEN NOMINATED BY THE PRESIDENT TO THE POSITION OF U. S. DISTRICT JUDGE FOR THE DISTRICT OF SOUTH DAKOTA.

JOHN JONES AND I GREW UP AS NEIGHBORS IN LYMAN COUNTY, SOUTH DAKOTA. WE ATTENDED SCHOOL IN THE COUNTY, AND LATER SERVED IN THE SOUTH DAKOTA LEGISLATURE TOGETHER -- HE IN THE HOUSE OF REPRESENTATIVES WHILE I WAS IN THE SENATE.

THE COMMITTEE HAS BEFORE IT EXTENSIVE REPORTS ON HIS BACKGROUND, TRAINING AND TECHNICAL QUALIFICATIONS FOR THE POSITION OF DISTRICT JUDGE.

I WANT TO COMMENT BRIEFLY UPON SOME QUALITIES WHICH PROMPT ME AND A HOST OF OTHERS IN SOUTH DAKOTA TO INCLUDE JOHN JONES AMONG THE VERY, VERY SELECT FEW WE ESTEEM AND HOLD IN HIGHEST RESPECT. JOHN'S PERSONAL INTEGRITY, HIS HONESTY, HIS SENSE OF PERSONAL RESPONSIBILITY, HIS DILIGENCE, HIS DEDICATION TO AND HIGH REGARD FOR THE LAW, AND PARTICULARLY, HIS UNIQUE UNDERSTANDING OF PEOPLE AND THEIR PROBLEMS ARE AMONG HIS VERY SPECIAL ATTRIBUTES.

WHEN A JUDICIAL QUALIFICATIONS COMMITTEE, UPON EXAMINING THE QUALIFICATIONS OF OVER A DOZEN POTENTIAL NOMINEES FOR THIS POSITION ON THE FEDERAL BENCH, INCLUDED JOHN JONES AMONG THEIR RECOMMENDATIONS AND HE WAS ULTIMATELY SELECTED, THIS CHOICE WAS GREETED WITH RARE UNANIMITY FROM MEMBERS OF THE JUDICIARY, THE LEGAL PROFESSION, THE PRESS, REPUBLICANS AND DEMOCRATS ALIKE -- AND EVEN AMONG THE OTHERS ASPIRING TO THE FEDERAL BENCH.

U. S. DISTRICT JUDGE FRED J. NICHOL, WHO IS RETIRING THIS YEAR, SAID OF JUDGE JONES: "EVERY WORD I'VE EVER HEARD OF HIM . . . HAS BEEN GOOD, AND I WELCOME HIM TO THE FEDERAL JUDICIARY." "A JUDGE'S JUDGE" -- "A TOPFLIGHT CHOICE . . . AND YOU WILL HAVE NO REGRETS WHATEVER OVER HIS CARRYING OUT OF THAT OFFICE" -- "A REPUTATION OF ABILITY AND FAIRNESS AND A PERSONAL INTEGRITY BEYOND REPROACH" -- "A GRATIFYING CHOICE ON MERIT AND QUALIFICATIONS AND

NOT FOR POLITICAL REASONS" -- "A GREAT CREDIT TO THE LEGAL PROFESSION AND TO THE BENCH" ARE TYPICAL OF THE PUBLIC COMMENTS WHICH GREETED THE ANNOUNCEMENT OF HIS SELECTION.

SUCH UNIVERSAL TRIBUTE IS HIGHLY UNUSUAL IN SOUTH DAKOTA OR ANY OTHER STATE.

AS I POINTED OUT EARLIER HE WAS BORN IN AND GREW UP IN OUR STATE. HE CONTINUES TO RESIDE IN PRESHO, SOUTH DAKOTA.

HE RECEIVED HIS COLLEGE AND LAW SCHOOL EDUCATION AT THE UNIVERSITY OF SOUTH DAKOTA. THIS WAS PRECEDED BY TWO YEARS OF ACTIVE DUTY IN THE UNITED STATES NAVY. AFTER COMPLETING LAW SCHOOL, JUDGE JONES ENTERED PRIVATE PRACTICE AND CONCURRENTLY SERVED AS COUNTY JUDGE IN LYMAN COUNTY, SOUTH DAKOTA.

IN 1967 HE WAS APPOINTED CIRCUIT JUDGE FOR THE TENTH DISTRICT OF SOUTH DAKOTA, WHERE HE HAS CONTINUED TO SERVE WITH DISTINCTION AS CIRCUIT JUDGE. IN ADDITION TO HIS SERVICE IN THE SOUTH DAKOTA LEGISLATURE, HE HAS BEEN ACTIVE IN NUMEROUS CIVIC AND PROFESSIONAL ENDEAVORS. PARTICULARLY NOTEWORTHY IS HIS SERVICE TO THE SOUTH DAKOTA AMERICAN LEGION BOYS' STATE, A PROGRAM FOR YOUNG PEOPLE DEALING WITH THE RESPONSIBILITIES OF CITIZENSHIP AND GOVERNMENT.

I AM VERY HONORED TO RECOMMEND HIM AS A FEDERAL DISTRICT COURT JUDGE FOR SOUTH DAKOTA.

Senator LAXALT. Senator Denton?

Mr. Cox, will you kindly step forward with your Senator?

STATEMENT OF HON. JEREMIAH DENTON, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator DENTON. Thank you, Mr. Chairman.

Today I have the honor of introducing to the committee an outstanding Alabamian, Mr. Emmett Ripley Cox. I am very pleased that he is being considered for appointment as U.S. district judge for the Southern District of Alabama, and particularly pleased because he is from my own home town, Mobile.

As an attorney and community leader, Mr. Cox has displayed those qualities that typify outstanding Federal judges. He is an honors graduate of the University of Alabama Law School and a longtime partner of one of the finest law firms in our part of the State. His service to country in the Air National Guard and his active participation in civic affairs have helped make him an admired and distinguished member of the community. All who know him feel that in the years to come he will likewise distinguish himself as a Federal judge.

Mr. Cox is known to his friends and colleagues as "Rip." I would like to say a personal word of welcome to Rip and note for the record that this is the first time in over 100 years that a Republican Senator from our State has been able to take part in the process of selecting a Federal district judge. I can think of no better appointment to start with on that trend than with that of Rip Cox.

A hometown newspaper, reporting on Rip's nomination, called him "soft-spoken, reserved, and a stranger to limelight." Perhaps a few other Americans agree with me that we need a few more Federal judges who are less obstreperous than some, who come closer to fitting the above description.

I am gratified that Rip Cox accepted the call of the President to become a public servant. I believe his nomination is indicative of the caliber of the judicial leadership that this administration is seeking. I am certain that Alabama and the Nation will benefit from his judgment, intelligence, and legal skills. I am pleased to support his nomination and I commend him to my distinguished colleagues on this committee.

I would like to thank you, Mr. Chairman, for permitting me that statement.

Senator LAXALT. Thank you very much.

I am afraid we have another vote on so we will have to be in recess for just a few minutes. Hopefully this will be the last interruption. We will be brief.

[Brief recess.]

Senator DECONCINI [acting chairman]. The Judiciary Committee will come to order. The next nominee before the committee today is Emmett Ripley Cox of Alabama, to be U.S. district judge for the Southern District of Alabama.

Mr. Cox, would you please stand and be sworn?

Mr. Cox. Yes.

Senator DECONCINI. Do you swear that the testimony you are about to give to this committee is the truth, so help you God?

Mr. Cox. I do.

Senator DeConcini. Mr. Cox, we welcome you here today and we are pleased to have you before the Judiciary Committee. If you have any family you would care to introduce or any opening statement or remarks, please proceed.

Mr. Cox. I would like to introduce my wife, Ann.

Senator DeConcini. Mrs. Cox, we welcome you here today.

Mr. Cox, do you have any opening statement or any comments?

TESTIMONY OF EMMETT RIPLEY COX OF ALABAMA, NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF ALABAMA

Mr. Cox. No, sir.

I would like to thank Senator Denton for his statement, but nothing further.

Senator DeConcini. Very good.

Mr. Cox, do you think your relative lack of criminal trial experience will hinder your ability to take full control of the duties required by the U.S. district court? Could you give us some background of how you intend to cope with the huge burden that the district court has in the criminal area?

Mr. Cox. Well, sir, I do not think it will be a problem other than it will require some extra work and probably longer hours for some period of time. I have discussed this question with the present chief judge, who went to the bench with an experience comparable to mine so far as criminal law is concerned, and he has assured me that with work it is something that can be picked up in a relatively short period of time.

Senator DeConcini. Mr. Cox, what would your feeling or approach be toward handling a hypothetical instance that could come before your court where one of the parties is represented by someone who was obviously not a skilled litigator or was not prepared adequately in presentation of his client's case? What do you think is the responsibility of a district court judge in such an instance?

Mr. Cox. Well, that is a difficult question to answer. I think it probably would depend on the degree of incompetence that we are talking about. There is something frequently said in our office, that you have a constitutional right to be represented by incompetent counsel of your own choosing, and to a certain extent that is true. Therefore, I think it would have to be a case of very severe lack of representation, and I suppose that the first thing I would be inclined to do would be to want to discuss it with the client and be sure that the client was aware of it.

Senator DeConcini. Given a very obvious situation, would you have any hesitancy to discuss it with the client?

Mr. Cox. Well, I——

Senator DeConcini. In other words, is your commitment to the statement you made—that people are entitled to choosing their own counsel—stronger commitment than that people are entitled to adequate representation?

Mr. Cox. No, sir, I do not think so. I certainly would discuss it with the client in a proper case.

Senator DECONCINI. How do you feel, Mr. Cox, about requiring attorneys to undergo special training before being allowed to practice in the Federal court?

Mr. COX. Well, that is not a question that I have studied at all. Off the top of my head, my opinion would be that I have not been satisfied that that is necessary.

Senator DECONCINI. You have not been satisfied that that is necessary?

Mr. COX. No, sir.

Senator DECONCINI. I have no further questions.

Does the Senator from Alabama have any statement or questions?

STATEMENT OF HON. HOWELL HEFLIN, A U.S. SENATOR FROM THE STATE OF ALABAMA

Senator HEFLIN. Well, I am sorry that I was late. We have had votes and such interruptions here today that——

Senator DECONCINI. If you like to make some remarks——

Senator HEFLIN. I really had intended along after Senator Denton to make some opening remarks.

It is a distinct honor and pleasure for me, along with Senator Denton, to present to the U.S. Senate Committee on the Judiciary, Emmett Ripley Cox of Alabama, the nominee for the position of U.S. district court judge for the Southern District of Alabama.

Mr. Chairman, as you well know, just a few months ago in this very hearing room we passed judgment on Justice Sandra O'Connor's fitness for service on the Bench of the highest Court in the land. As important as that Court is and that nomination was, we often lose sight of the fact that it is our entire network of Federal courts that serves to protect our precious civil liberties and preserve our basic constitutional guarantees.

It is the Federal district court which is the foundation, the bedrock, of that system. It is the district court, the entry level trial court within the Federal judiciary, to which aggrieved parties look for equity and justice. The vast majority of cases filed in the Federal courts never reach the Supreme Court, not because they are not meritorious, but because they have been disposed of and parties given redress at the trial court level.

Recognizing the importance of the district court in our federal system of jurisprudence, it is then no insignificant nomination which these hearings take up and have been taking up here today. I commend the President on this nomination. Mr. Cox is an outstanding attorney and I am confident that he will serve with distinction upon confirmation.

Mr. Cox graduated in the upper 5 percent of his class at the University of Alabama Law School, where he was a member of the moot court team representing the University of Alabama, winning the southeastern competition and competing with distinction at the national competition in New York.

Upon graduation from law school, he has practiced law continuously in Birmingham and in Mobile, Ala. The hallmark of his practice has been legal scholarship of the highest order, as exemplified by a landmark case early in his legal career entitled *Dallas County*

v. *Commercial Union Assurance Co.,* which is reported at 286 F.2d 388. It involved the falling of a clock from the steeple of the courthouse of Dallas County, Ala. This case turned on the cause of the fall and whether a fire more than a half century before this incident was proximately related to the accident.

As a young lawyer, Mr. Cox realized the predicament his client was in in regards to evidentiary proof, and diligently searched the records of the Selma Morning Times until he found the appropriate article from 1901 supporting his client's position. On appeal based upon Mr. Cox's brief, the Fifth Circuit Court of Appeals wrote what has been acclaimed the single clearest treatise on the hearsay rules of evidence in modern times, establishing the ancient document as a significant exception to the hearsay rule. Such legal scholarship has characterized Mr. Cox's work ever since.

This position in the Southern District of Alabama is perhaps unique. It is headquartered in Mobile, one of the major port areas of the Nation. It has only two active trial judges who carry an extremely heavy case load comprised of an interesting mixture of not only traditional civil and criminal litigation but also an extemely large docket of admiralty, labor management, and constitutional rights litigation.

Mr. Cox has had a diverse practice encompassing a great number of these areas. He has on a regular basis represented both the plaintiffs and the defendants in civil litigation and has had a heavy dose of admiralty, real estate, and labor law practice in both Federal and State courts.

Based upon my observations and the nominee's eminent reputation within the legal community of Alabama, I am confident that he will serve with great distinction on the Federal bench, and with each case he tries provide proof of the wisdom of President Reagan's nomination. It is with a great deal of pleasure that I recommend and wholeheartedly support the nomination of Emmett Ripley Cox for this important position.

I have also a letter here from the chief justice of the State of Alabama in support of Mr. Cox's nomination.

Senator DECONCINI. Without objection, the letter and your statement will be inserted in the record at this point. I thank the Senator from Alabama.

[Material referred to above follows:]

PREPARED STATEMENT OF SENATOR HOWELL HEFLIN

MR. CHAIRMAN, IT IS MY DISTINCT HONOR AND PLEASURE TO PRESENT TO THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY EMMETT RIPLEY COX OF ALABAMA, NOMINEE FOR THE POSITION OF UNITED STATES DISTRICT COURT JUDGE FOR THE SOUTHERN DISTRICT OF ALABAMA.

MR. CHAIRMAN, AS YOU WELL KNOW, IT WAS BUT A FEW MONTHS AGO, IN THIS VERY HEARING ROOM, THAT WE PASSED JUDGMENT ON JUSTICE SANDRA O'CONNOR'S FITNESS FOR SERVICE ON THE BENCH OF THE HIGHEST COURT IN THE LAND. AS IMPORTANT AS THAT COURT IS, AND THAT NOMINATION WAS, WE OFTEN LOSE SIGHT OF THE FACT THAT IT IS OUR ENTIRE NETWORK OF FEDERAL COURTS WHICH SERVES TO PROTECT OUR PRECIOUS CIVIL LIBERTIES AND PRESERVE OUR BASIC CONSTITUTIONAL GUARANTEES. AND IT IS THE FEDERAL DISTRICT COURT WHICH IS THE FOUNDATION, THE BEDROCK, OF THAT SYSTEM. IT IS THE DISTRICT COURT--THE ENTRY LEVEL TRIAL COURT WITHIN THE FEDERAL JUDICIARY--TO WHICH AGGRIEVED PARTIES LOOK FOR EQUITY AND JUSTICE. THE VAST MAJORITY OF CASES FILED IN FEDERAL COURT NEVER REACH THE SUPREME COURT--NOT BECAUSE THEY ARE NOT MERITORIOUS, BUT BECAUSE THEY HAVE BEEN DISPOSED OF, AND PARTIES GIVEN REDRESS, AT THE TRIAL COURT LEVEL. RECOGNIZING THE IMPORTANCE OF THE DISTRICT COURT IN OUR FEDERAL SYSTEM OF JURISPRUDENCE, IT IS, THEN, NO INSIGNIFICANT NOMINATION WHICH THESE HEARINGS TAKE UP TODAY.

I COMMEND THE PRESIDENT ON THIS NOMINATION. RIP COX IS AN OUTSTANDING ATTORNEY AND I AM CONFIDENT THAT HE WILL SERVE WITH DISTINCTION UPON CONFIRMATION. RIP GRADUATED IN THE UPPER FIVE PERCENT OF HIS CLASS AT THE UNIVERSITY OF ALABAMA LAW SCHOOL, WHERE HE WAS A MEMBER OF THE MOOT COURT TEAM REPRESENTING THE UNIVERSITY, WINNING THE SOUTHEASTERN COMPETITION AND COMPETING WITH DISTINCTION AT THE NATIONAL COMPETITION IN NEW YORK.

UPON GRADUATION FROM LAW SCHOOL, HE HAS PRACTICED CONTINUOUSLY IN BIRMINGHAM AND MOBILE, ALABAMA. THE HALLMARK OF HIS PRACTICE

HAS BEEN LEGAL SCHOLARSHIP OF THE HIGHEST ORDER, AS EXEMPLIFIED BY A LANDMARK CASE EARLY IN HIS LEGAL CAREER. *DALLAS COUNTY v. COMMERCIAL UNION ASSURANCE CO.*, 286 F.2D 388. IT INVOLVED THE FALLING OF A CLOCK FROM THE STEEPLE OF THE COURTHOUSE OF DALLAS COUNTY, ALABAMA. THIS CASE TURNED ON THE CAUSE OF THE FALL AND WHETHER A FIRE MORE THAN A HALF CENTURY BEFORE THIS INCIDENT WAS PROXIMATELY RELATED TO THE ACCIDENT. AS A YOUNG LAWYER, RIP COX REALIZED THE PREDICAMENT HIS CLIENT WAS IN REGARDING EVIDENTIARY PROOF, AND DILIGENTLY RESEARCHED THE RECORDS OF THE *SELMA MORNING TIMES* UNTIL HE FOUND THE APPROPRIATE ARTICLE FROM 1901 SUPPORTING HIS CLIENT'S POSITION. ON APPEAL, BASED UPON RIP'S BRIEF, THE FIFTH CIRCUIT COURT OF APPEALS WROTE WHAT HAS BEEN ACCLAIMED THE SINGLE CLEAREST TREATISE ON THE HEARSAY RULES OF EVIDENCE IN MODERN TIMES, REESTABLISHING THE ANCIENT DOCUMENT AS A SIGNIFICANT EXCEPTION TO THE HEARSAY RULE. SUCH LEGAL SCHOLARSHIP HAS CHARACTERIZED RIP COX'S WORK EVER SINCE.

THIS POSITION IN THE SOUTHERN DISTRICT OF ALABAMA IS PERHAPS UNIQUE. IT IS HEADQUARTERED IN MOBILE, ONE OF THE MAJOR PORT AREAS OF THE NATION. IT HAS ONLY TWO ACTIVE TRIAL JUDGES, WHO CARRY AN EXTREMELY HEAVY CASELOAD COMPRISED OF AN INTERESTING MIXTURE OF NOT ONLY TRADITIONAL CIVIL AND CRIMINAL LITIGATION, BUT ALSO AN EXTREMELY LARGE DOCKET OF ADMIRALTY, LABOR-MANAGEMENT, AND CONSTITUTIONAL RIGHTS LITIGATION.

RIP COX HAS HAD A DIVERSE PRACTICE ENCOMPASSING A GREAT NUMBER OF THESE AREAS. HE HAS ON A REGULAR BASIS, PRESENTED BOTH PLAINTIFFS AND DEFENDANTS IN CIVIL LITIGATION; AND HAS HAD A HEAVY DOSE OF ADMIRALTY, REAL ESTATE AND LABOR LAW PRACTICE IN BOTH FEDERAL AND STATE COURTS.

BASED UPON MY PERSONAL OBSERVATION, AND THE NOMINEE'S EMINENT REPUTATION WITHIN THE LEGAL COMMUNITY OF ALABAMA, I AM CONFIDENT THAT HE WILL SERVE WITH GREAT DISTINCTION ON THE FEDERAL BENCH, AND WITH EACH CASE HE TRIES, PROVIDE PROOF OF THE WISDOM OF

PRESIDENT REAGAN'S NOMINATION. IT IS WITH A GREAT DEAL OF PLEASURE THAT I RECOMMEND AND WHOLEHEARTEDLY SUPPORT, THE NOMINATION OF EMMETT RIPLEY COX FOR THIS MOST IMPORTANT POSITION.

THANK YOU MR. CHAIRMAN.

SUPREME COURT OF ALABAMA

C. C. TORBERT, JR.
CHIEF JUSTICE

P. O. BOX 218
MONTGOMERY, ALABAMA 36101

November 12, 1981

Senator Strom Thurmond, Chairman
U. S. Senate Committee on the Judiciary
Washington, D.C. 20510

Dear Senator Thurmond:

I write in support of the confirmation of Emmett R. Cox who has been nominated by the President as United States District Judge for the Southern District of Alabama.

From 1954 until 1977, I have been engaged in the active practice of law in Alabama, and have served on the governing board of the Alabama State Bar, as well as in both the House of Representatives and State Senate of Alabama. Since 1977 I have served as Chief Justice of the Supreme Court of Alabama and chief administrative head of the Unified Judicial System of Alabama. In both my professional capacity as well as personally, I have known Mr. Cox for a number of years. He is an outstanding trial lawyer, active in Bar affairs, and a person of excellent background and character. It is my judgment and opinion that Mr. Cox, if confirmed by the United States Senate, will serve in this high office with honor and distinction. His nomination has been well received by the people generally in the Southern District, and his application for appointment was supported by a vast majority of the members of the Alabama Bench and Bar.

It is without reservation that I am pleased to support and recommend favorable consideration by the Senate Committee on the Judiciary. If appropriate, I would be pleased to testify on his behalf.

Yours very truly,

C. C. Torbert, Jr.
Chief Justice

CCTJr:sm

cc: Members, U. S. Senate Committee on the Judiciary
Mr. Arthur Briskman

Senator DECONCINI. Mr. Cox, I had no idea you had such an endorsement coming from the two Senators from Alabama, both of whom sit on this committee.

Does the Senator from Alabama have any questions?

Senator HEFLIN. I have none.

Senator DECONCINI. Mr. Cox, we have no further questions. There may be questions that we will submit.

Does anyone care to testify in support of this nomination or in opposition to it? Please come forward at this time.

[No response.]

Senator DECONCINI. If not, thank you, Mr. Cox.

Mr. Cox. Thank you. sir.

[Response of Mr. Cox to committee query:]

Mr. Cox, our records indicate that your Federal income tax returns for the years 1977-78-79 & 80 were timely filed. However you failed to pay tax penalties and interest within 10 days after notice and demand for this same period.

A synopsis of these years are as follows:

A notice for the tax of $60.67 for the 1977 tax return was sent on August 7, 1978. The account was full paid on September 1, 1978.

A notice for the tax, estimated tax penalty, failure to pay tax penalty and interest of $15,016.10 for the 1978 tax return was sent on Septemer 24, 1979. The account was full paid on October 22, 1979.

A notice for the tax, estimated tax penalty, failure to pay tax penalty and interest of $7,866.08 for the 1979 tax return was sent on July 28, 1980. The account was full paid on November 12, 1980.

A notice for the failure to pay tax penalty, estimated tax penalty and interest of $4,759.39 for the 1980 tax return was sent on July 20, 1981. To date, the account has not been paid.

There is no record of penalties for negligence during the tax years indicated above. There is no record of criminal tax investigations or civil penalties for fraud under the internal revenue laws.

Mr. Cox, would you also advise the committee as to the accuracy of this info, as well as your reason for not paying in full when the returns were filed.

ADDITIONAL REMARKS OF EMMETT RIPLEY COX BEFORE THE U. S. SENATE JUDICIARY COMMITTEE

13 November 1980

I have been asked to comment on certain specific matters relative to payment of federal income taxes for the calendar years 1977, 1978, 1979 and 1980.

My federal income tax return for the calendar year 1977 was, as best I recall (I do not have a copy of the return before me) timely filed, either on April 15, 1978 (or on June 15, 1978, under the automatic 60 day extension provisions). I am advised by Mr. Duke Short that he is informed that I was sent a notice by the I.R.S. on August 7, 1978, that $60.67 was due on my 1977 taxes, and that I paid this $60.67 on September 1, 1978. While I do not have this notice before me, I assume that the $60.67 was either some kind of penalty for late payment of estimates or for interest because I do not think I would have mailed a check with the return which was only $60.67 short of paying my total taxes.

My tax return for the calendar year 1978 was, as best I recall, also timely filed (either on April 15, 1979 or June 15, 1979), but I did not pay in full at the time of filing all taxes shown to be due on the return. I am advised by Mr. Duke Short that he is informed that I was sent a notice on September 24, 1979, by the I.R.S. showing $15,016.10 due on 1978 taxes, and that I paid this in full on October 22, 1979. I did not pay these taxes in full when the return was filed because I did not have the money and was reluctant to undertake to borrow it, particularly since I anticipated being able to pay the balance in full within a few months.

My tax return for the year 1979 was, as best I recall, also timely filed (either on April 15, 1980, or June 15, 1980), but I was not able to pay in full all taxes due per the return when I filed the return. My secretary, who looked at this return in Mobile at my request, tells me that my total taxes for 1979 per the return were eighteen thousand three hundred fifty and some odd dollars. I am advised by Mr. Duke Short that he is informed that I received a notice from I.R.S. dated July 28, 1980, showing a balance due of $7,866.08 for taxes, penalties and interest, and that I paid it in full on November 12, 1980. While a majority of the taxes due for 1979 were paid by the time of the filing of the return, they were not paid in full for the same reason my 1978 taxes were not paid in full when the return was filed.

My tax return for the year 1980 was, as I recall, filed on June 15, 1981, under the 60 day automatic extension provisions. The total taxes due per my return were (my secretary advises me) $20,755.01. I did not pay in full the balance due on these taxes when the return was filed and Mr. Duke Short advises me that I received a notice on July 20, 1981, that there was a balance due of $4,759.39. I mailed I.R.S. a check for $3945.01 on July 13, 1981, a check for $814.38 on August 6, 1981, and a check for $140.57 on September 24, 1981. (The check for $140.57 was mailed because I received a notice that I had over-paid my 1980 taxes and that the overpayment was being applied to 1979 taxes, leaving a balance due of $140.57 on 1979 taxes; at that time I had no recollection of having received any notice that there was $140.57 still due on 1979 taxes, but I paid the $140.57 by check mailed on September 24, 1981. I did not pay in full the balance of the $20,755.01 due for 1980 taxes when the return was filed and that is why I received a notice that $4759.39 was still due for 1980 taxes, penalties and interest. I did not pay the taxes in full when the return was filed because I did not have the money, was reluctant to undertake to borrow it, and expected to be able to pay the balance in full within a few months.

At this time all of my 1980 taxes, and taxes for prior years, are to the best of my knowledge paid in full.

My secretary advises me that my State Tax Return for 1980 reflects that my total payments to I.R.S. in the calendar year 1980 were $30,093.62, which represented payment on 1979 taxes (including penalties and interest) and estimates on 1980 taxes and this represented a serious effort on my part to bring my taxes current.

Emmett Ripley Cox
Emmett Ripley Cox

Subscribed and sworn to
before me this 13th day of
September, 1981.

Tommy E. [illegible]
NOTARY PUBLIC
DISTRICT OF COLUMBIA

MY COMMISSION EXPIRES [illegible]

Senator DECONCINI. The next nominee is Clarence A. Beam of Nebraska, nominated to be U.S. district judge for the District of Nebraska.

Mr. Beam, would you please come forward?

Raise your right hand.

Do you swear the testimony you are about to give this committee is the truth, so help you God?

Mr. BEAM. I do, sir.

Senator DECONCINI. Does the Senator from Nebraska care to join Mr. Beam?

Mr. Beam, we welcome you here today.

Senator Zorinsky, we welcome you. If you have a statement, please go ahead.

Senator ZORINSKY. Thank you, Mr. Chairman. I have given my opening statement previous to your arrival.

Senator DECONCINI. Very good. It will appear in the record at that point, then.

Mr. Beam, we are pleased to have you. If you have any family that you would care to introduce or any opening statement or comments, now is the time to do it, sir.

Mr. BEAM. Thank you, Mr. Chairman. I do have my wife, Betty, with me.

Senator DECONCINI. Welcome, Mrs. Beam. We are pleased to have you here today.

TESTIMONY OF CLARENCE A. BEAM, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEBRASKA

Mr. BEAM. By way of opening statement, Mr. Chairman, I would like to thank the committee and its staff for its many courtesies in connection with my appearance here today. I would also like to thank Senator Zorinsky and Senator Exon, both of whom came today and introduced me to the committee. I appreciate their appearances very much.

Beyond that, sir, I have no further opening statement.

Senator DECONCINI. You have fine endorsements from those two Senators, I can assure you.

May I submit a couple of questions to you, Mr. Beam? What is your opinion of a need, if any, to speed up the disposition of Federal cases? Are you familiar with the backlog that some of the Federal courts have, notwithstanding the omnibus judgeship bill we passed 2 years ago? Do we need more judges, more magistrates, or changes of criminal procedures? Do you have any other comments or suggestions?

Mr. BEAM. Well, Mr. Chairman, in the State of Nebraska we do not seem to have a backlog of cases such as I read about in other locations. Therefore, this is not an issue that I have given a great amount of study. I know that this is a problem that must continue to have the attention of the Federal judiciary as it does have, I am sure, the attention of this committee in its deliberations.

Senator DECONCINI. Have you had criminal experience in your practice of law, Mr. Beam?

Mr. BEAM. My criminal trial experience, Mr. Chairman, is minimal.

Senator **DeConcini**. How are you going to address that particular situation once you are sworn in?

Mr. **Beam**. I recognize, Mr. Chairman, that I will need to address this lack of experience, and I would plan to spend whatever time is necessary to address the criminal caseload of the Nebraska court. I would plan to visit at length with our two other active U.S. judges and seek their aid and assistance in this regard. I would plan to go to work immediately and attempt, continuously, to improve my capabilities in that area, Mr. Chairman.

Senator **DeConcini**. In your practice, have you practiced before the district court?

Mr. **Beam**. Yes, sir.

Senator **DeConcini**. Only in civil matters?

Mr. **Beam**. Basically in civil matters. I have handled some criminal matters but primarily civil matters, Mr. Chairman.

Senator **DeConcini**. As a Federal judge, do you believe that it is proper and would you participate in attempting to improve the criminal justice system and the entire judicial system, with participation in study groups and educational programs? How do you feel about the judiciary being involved after they become sworn and take their place on the bench?

Mr. **Beam**. Yes, sir, I would. I am a strong believer in continuing legal education, both for lawyers and the judiciary.

Senator **DeConcini**. I have no further questions.

If there are no questions, is there anyone who wants to testify in favor of or in opposition to this nominee? Please come forward at this time.

[No response.]

Senator **DeConcini**. If not, I thank you, Mr. Beam. Thank you, Senator Zorinsky, for being with us today with this fine nominee.

Senator **Zorinsky**. Thank you, Mr. Chairman.

Mr. **Beam**. Thank you, Mr. Chairman.

Senator **DeConcini**. Our next nominee is John Bailey Jones of South Dakota.

Mr. Jones, would you please come forward?

Senator Abdnor, would you please join us?

Please raise your right hand.

Do you swear that the testimony you are about to give the committee today is the truth, so help you God?

Judge **Jones**. I do.

Senator **DeConcini**. Senator Abdnor, we welcome you here with this nominee today. If you care to make an introductory remark, please proceed.

Senator **Abdnor**. Mr. Chairman, I appreciate that but earlier I also made a statement on behalf of Judge Jones, who we are all very proud of out in South Dakota. I think I will just let him go ahead.

Senator **DeConcini**. Very good.

Well, Mr. Jones, we cannot understand why you are not in Arizona. We have so many South Dakotans out there, and we welcome you there any time.

Judge **Jones**. Thank you.

Senator **DeConcini**. Let me indicate that the introduction by Senator Abdnor will appear in the record at the appropriate place.

Mr. Jones, if you have any relatives you would care to introduce or any comments you would care to make, now is the time to do so, sir.

Judge JONES. Thank you, Mr. Chairman.

I would like to introduce to the committee my wife Rosemary, who is here, and also I would like to introduce Congressman Clint Roberts' wife Bev, who was kind enough to accompany us here today.

Senator DECONCINI. We are very pleased to have you. Thank you for being with us today.

TESTIMONY OF JUDGE JOHN BAILEY JONES, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF SOUTH DAKOTA

Judge JONES. Mr. Chairman, I do not have any statement to make but I do want to thank Senator Pressler and Senator Abdnor for their kind remarks and for recommending me for this position.

I want to also thank Congressman Clint Roberts from my area, my town, who has given me a great deal of encouragement and support during this process.

Senator DECONCINI. Well, Judge, reviewing your résumé quickly here I notice the outstanding experience you have had on the 10th judicial circuit and the 6th judicial circuit and the county court in Lyman County. I compliment you for your willingness to serve on the Federal district court.

Does the judicial system of South Dakota have a process for discipline or removal of judges?

Judge JONES. Yes, sir, we have a South Dakota Judicial Qualifications Commission, and it has been my pleasure and privilege to have served on that commission for an 8-year period from the time of its inception until this past July 1.

Senator DECONCINI. Have there ever been any judges disciplined or removed?

Judge JONES. There have been hearings held and some disciplinary action taken. The problems facing the commission have been thus far resolved without the necessity of removing any South Dakota judges.

Senator DECONCINI. Judge Jones, do you have any opinion as to favoring or disfavoring judicial tenure legislation that has passed or might be under consideration in Congress? A procedure would be set up solely within the judiciary to satisfy constitutional reasons for disciplinary action toward Federal judges?

Judge JONES. Well, it is my view that competent and efficient judges have nothing to fear from such groups, and I have no problem at all with that.

Senator DECONCINI. I compliment you on that because I happen to feel the same way. It is nice to see judges with experience who have no fear of any hearings or complaints that are filed against them. I think overall the judiciary performs exceptionally well in this country but like anything, sometimes something goes astray. As you know, because the only recourse available now is impeachment in the Federal area, it is extremely difficult and nigh impossible for the House of Representatives and the Senate to truly take on any type of impeachment proceedings. I am advised there have only been 16 in the history of our Nation.

Judge Jones, given your many years of judicial experience as well as having served in the South Dakota Legislature, do you have some suggestions for us today for guidelines that a judge should follow in determining the propriety of Federal intervention into State affairs?

Judge JONES. No concrete proposals, Mr. Chairman, but my experience in the State legislature and as a State judge has convinced me that the States and State institutions can solve most of their own problems. It is my view that Federal intervention into State problems should, therefore, be kept at a minimum.

Senator DECONCINI. Judge, having been on the South Dakota Bar Association, the general pattern jury instructions committee, and the criminal pattern jury instructions committee, do you feel it would be helpful to you as a U.S. district judge to also have a sentencing commission to establish uniformity in sentencing?

Judge JONES. Mr. Chairman, the sentencing of criminal offenders is one of the most difficult tasks that any judge faces. It is my belief that every person in that position is entitled to have individual consideration of all of the elements that go into the offense and the history of the offender. Mandatory sentences, as such, it is difficult to take into consideration all of those elements. I have some concern about mandatory sentences.

Senator DECONCINI. Are you also concerned about having a sentencing commission to establish uniformity in sentencing? Is that what you mean by mandatory?

Judge JONES. Well, I do not have any objection to a commission which would seek to get the sentences as uniform as possible but it is undesirable, I think, to have any sort of a mandatory sentencing.

Senator DECONCINI. Judge, I accept that from an expert with the many years you have had on the bench. We thank you for those comments.

I have no further questions.

If there is anyone here who cares to testify in favor of or in opposition to this nominee, please come forward at this time.

[No response.]

Senator DECONCINI. There being none, thank you, Judge.

Thank you, Senator Abdnor, very much.

Judge JONES. Thank you.

Senator DECONCINI. Our next nominee is Cynthia Holcomb Hall. Would you please come forward.

Would you please raise your right hand.

Judge Hall, do you swear the testimony you are about to give to the committee today is the truth, so help you God?

Judge HALL. I do.

Senator DECONCINI. Please be seated.

Judge, we are very pleased to have you here today. If you have any relatives or anybody you would care to introduce, please feel free to do so. Do you have an opening statement?

TESTIMONY OF JUDGE CYNTHIA HOLCOMB HALL, NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Judge HALL. I have no relatives here and I have no opening statement.

Senator DECONCINI. Very good.

We welcome you, Judge. Your fine, excellent background in the judiciary precedes you here. You have served in the Treasury Department, the Department of Justice, and since 1972, the U.S. Tax Court. You have indeed distinguished yourself in the course of that distinguished career.

How do you feel about judical activism from the standpoint of a U.S. district judge as it relates to State matters?

Judge HALL. I believe that it is the judiciary's reponsibility to interpret the law, to find the facts and to apply the law as it is presented to us. It is certainly not our job to make the law or to run institutions or be an executive in any way other than in the functioning of our own court.

Senator DECONCINI. How do you feel about the problem of prisons, prison reform, and prison overcrowding? Do you think it is proper under the circumstances for the district court to intervene in the State prison system?

Judge HALL. I think it is very undesirable to intervene in a prison system.

Senator DECONCINI. I agree.

Do you think that there can be proper circumstances that would necessitate such action?

Judge HALL. Not in running the institution; perhaps in the protection of an individual, but not in running an institution.

Senator DECONCINI. Do you feel it would be helpful to you as a judge to have a sentencing commission to establish uniformity in sentencing?

Judge HALL. If the sentencing commission were merely to recommend a uniform type of sentencing, then I think it would be helpful. The problem is that you need to look at the individual facts, the individual background of the person who has committed the crime. You already have the benefit of a probation report and the advice of the attorneys involved in the case, and there are many delays as it is now between the commission of the crime and the sentencing. I would hate to see another level of delay intervene in that particular case.

Senator DECONCINI. Therefore, I take it that you think a commission or other body to make recommendations is positive, but you do not think it is wise that any group establish the sentencing. Is that a fair summary?

Judge HALL. That is correct. That is fair. Thank you.

Senator DECONCINI. Thank you. Just for my own clarification.

I have no further questions of the witness. Is there anyone who cares to testify in favor of or opposition to this nomination? If so, please come forward at this time.

[No response.]

Senator DECONCINI. If not, thank you, Judge, very much. We are glad to have you here.

I am advised by counsel that we have three witnesses here who want to testify in opposition to Judge Lawrence W. Pierce. The first witness is Lillian Koegler.

Mrs. Koegler, would you please raise your right hand to be sworn?

Do you swear the testimony you are about to give the committee today is the truth, so help you God?

Mrs. **Koegler**. I do.

Senator **DeConcini**. Prior to your testimony I want to submit in the record a letter from John LeBoutillier of the Sixth District of New York in opposition to this nominee.

[The letter of Representative LeBoutillier follows:]

JOHN LeBOUTILLIER
6TH DISTRICT, NEW YORK

417 CANNON HOUSE OFFICE BUILDING
WASHINGTON, D.C. 20515
(202) 225-5956

COMMITTEE ON
FOREIGN AFFAIRS

Congreſs of the United States
Houſe of Repreſentatives
Waſhington, D.C. 20515

November 13, 1981

Mr. Duke Short
Nominations Committee
Senate Judiciary Committee
2216 Dirksen Building
Washington, D.C. 20510

Dear Mr. Short:

I am compelled to submit testimony in strong opposition to the nomination of Judge Lawrence W. Pierce for the position of Second District Court of Appeals Justice for the northeast region.

The position which Judge Pierce seeks, requires the utmost respect for the distinctions of legal authority, the values which Americans hold dear and permit our systems of law to function, and an appreciation for the deliniation of judicial powers.

Based on his past actions, Judge Pierce has developed a penchant for over-looking both the letter of the law, and the spirit of common sense and decency which most Americans recognize as the basis for justice. Judge Pierce has been a bad judge and a poor defender of fundamental values.

In July, 1975, Judge Pierce ruled against a legitimate New York State ordinance. He held that the appearance of violating freedom of expression was grounds to nullify a legally adopting local ordinance. The poor judgement demonstrated in this case is exceeded only by Judge Pierce's judical and philosphic arrogance.

Judge Pierce's action did not uphold the law. Indeed, it is evident that his judicial philosophy is characterized by personal, broad-based opinions and a lack of respect for existing statutes. Judge Pierce also has little respect for commonly held convictions of right and wrong. One need not be a legal scholar to know when injustice has occurred.

In March, 1980, Judge Pierce overturned a double murder conviction because the issue of possible juror prejudice was raised. Despite his admission that there was no supportable evidence of actual prejudice, Judge Pierce ordered a retrial on the basis of "implied bias" -- a truly remarkable legal manuveur. Such gymnastics serve only to cultivate public cynicism of the courts and make a mockery of our laws.

Judge Pierce fails to understand that there is a fundamental relationship between the law as written and the values that the people hold as right. That fact, combined with Judge Pierce's disregard for valid, existing statutes makes him unqualified to assume higher judicial office.

In echoing the angry laments of millions of frustrated Americans, "Enough is enough!" The courts must respect both the rights of local authority and the tenets of basic decency.

Judge Pierce does not understand this. He interprets the law as he sees fit, and in so doing, causes injustice.

As a Member of the United States Congress, I am deeply concerned with the ongoing assault on the rights of individuals and convention, which results in the guilty getting off on legal technicalities.

The American people have a good sense of justice. When the courts and individual judges lose sight of that fundamental premise, then it's time to revamp the courts and replace some judges.

In this instance, Judge Pierce must be denied appointment to the Second District Court of Appeals. He has neither the respect for the law, nor the decency that comes with common sense to effectively and justly fulfill the duties of that position.

Sincerely,

John LeBoutillier
Member of Congress

JLeB:mat

Senator DECONCINI. Please proceed.

TESTIMONY OF MRS. LILLIAN P. KOEGLER, WHITE PLAINS, N.Y.

Mrs. KOEGLER. I am here to speak on behalf of myself. I am the New York State chairman of the Conservative Caucus. I have been a teacher of social studies for 17 years in the White Plains schools. I am the mother of four children and I have one grandchild.

I speak on behalf of the 17,000 New York State caucus members who share a common concern for the strict retention of and regard for the constitutional process in our Nation which prescribes our system of the sharing of powers between our State and Federal governments.

In my remarks I will also incorporate the testimony of Prof. Robert Blecker of New York Law School, a professpr of constitutional history, on which the legal aspect of my testimony is based. I will submit this along with my written testimony.

Judge Pierce has on at least two occasions evidenced what we will describe as an "expansive" understanding of his power as a Federal judge under the U.S. constitutional plan. I will sum up these instances briefly, citing from testimony, again from Professor Blecker.

The first instance was in the case *Cobb* v. *Beame*, 1075, which involved a violation by members of the U.S. Labor Party of a 1917 New York City ordinance requiring the display of an American flag at all public assemblies warranted by law, that is, where sound amplification devices were employed. This ordinance had never been challenged since its adoption in 1917. U.S. Labor Party members had twice assembled without displaying the flag, had been arrested, and were scheduled to appear in local criminal court in July 1975.

Although this local criminal action was pending and the defendants had the clear opportunity immediately to have the constitutionality of the ordinance adjudicated by the State courts, at the last moment Judge Pierce, a Federal district judge, issued a temporary restraining order enjoining the city from enforcing the ordinance. Judge Pierce justified this interference with the orderly constitutional process of the State system by the extraordinary claim that any single State decision would merely amount to a single determination as to the rights of the particular defendants, thereby leaving unsettled the constitutionality of the statute as such.

Two serious problems are presented by Judge Pierce's action. First, by this preemptive action on the part of a Federal judge, Judge Pierce effectively blocked the State from deciding in the first instance the constitutionality of its own municipal ordinance. How does a State's highest court ever get the opportunity to declare any of its statutes violative of the U.S. Constitution except by the appellate process whereby, initiating in a single case, determination can be made whether a particular defendant's particular constitutional rights have been violated.

Second, this action, taken while two members of the U.S. Labor Party were awaiting prosecution in a State court, would seem to evidence a disregard on the part of Judge Pierce for the U.S. constitutional plan which recognizes that sovereign power is divided between the Federal Government and the State governments, and that each State shall be able to conduct its orderly judicial process without interference from the Federal judiciary.

Five years later, on March 13, 1980, Judge Pierce, in *Phillips* v. *Smith,* overturned the double murder conviction of William Phillips by issuing a writ of habeas corpus on the ground that the prosecutor had failed to inform the judge or the defense attorneys that during the course of the trial, one of the jurors—even though he had in the jury selection process indicated he was interested in a law enforcement career—applied for a job as an investigator in the New York County district attorney's office, whereupon Judge Pierce called for a mistrial.

Although Judge Pierce himself specifically acknowledged that there was no supportable claim of actual prejudice, nevertheless he ordered this retrial based solely upon a doctrine of implied bias or what he labeled a "conclusive presumption" of partiality. This issue of possible juror prejudice was the focus of extensive post trial hearings, after which Justice Burns, the New York trial judge, held that Phillips had not been deprived of his constitutional right to an impartial trial by his peers or otherwise been prejudiced.

The New York State appellate division affirmed the conviction and the highest State court of appeals rejected Phillips' claims. In a vigorous dissent from the affirmance of Pierce's actions, Circuit Judge van Graafeiland observed, and I quote:

> Reprehensible conduct by a State prosecutor which has not deprived the defendant of a fair trial does not warrant Federal habeas corpus relief . . . New York State Supreme Court judges are obligated and fully qualified to supervise the trial conduct of State prosecutors . . . the purpose of habeas corpus "is not punishment of society for the misdeeds of a prosecutor but avoidance of an unfair trial to the accused."

In this Judge van Graafeiland quoted the U.S. Supreme Court decision of 1963, *Brady* v. *Maryland.*

In *Phillips,* Judge Pierce singly nullified the collective decisions of New York State courts. In *Cobb,* he effectively blocked State court action. Our concern is not with the wisdom or constitutionality of New York City's flag ordinance, nor are we examining the actions of State prosecutors. The merits of each case are arguable but they were not for Judge Pierce to argue.

Every judge, State or Federal, must according to oath conscientiously analyze the Constitution and apply it to cases at hand. It is essential that judges have a proper understanding of their role under the constitutional plan, a vital sense of Federal restraint, and a healthy respect for State and local autonomy.

A judge who bases official decisions or actions on subjective presumptions of bias or partiality places himself in question as to his possession of that most vital requisite of judicial integrity—objectivity.

For these reasons, we feel that Judge Pierce's actions in these matters deserve the closest scrutiny by this committee. Respectfully submitted.

Senator DECONCINI. Thank you very much.

Mrs. KOEGLER. Thank you.

Senator DECONCINI. I have no questions.

[The prepared statement of Mrs. Koegler and memorandum of Robert Blecker and Robert F. Salvia follow:]

TO: MEMBERS OF THE U. S. SENATE JUDICIARY COMMITTEE
Honorable J. Strom Thurmond, Chairman

RE: Appointment of Lawrence W. Pierce, U. S. FEDERAL JUDGE
United States District Court
S. D. New York

TESTIMONY: Mrs. Lillian P. Koegler
4 Hotel Drive
White Plains, N.Y. 10605 914-946-6719

N. Y. State Chairman, CONSERVATIVE CAUCUS
Teacher of Social Studies, 17 years, White Plains Schools
Mother--4 children, 1 grandchild

I appreciate this opportunity to speak to you regarding Lawrence W. Pierce, Judge of the United States District Court of New York.

As New York State Chairman of the Conservative Caucus I would like to speak on behalf of the 17,000 N. Y. State Caucus members who share a common concern for the strict retention of and regard for the Constitutional process in our nation which proscribes our system of the sharing of powers between our state and Federal governments.

Judge Pierce has on at least two occasions evidenced what we will describe as an "expansive" understanding of his power as a Federal judge under the U. S. Constitutional plan. I will sum up these instances briefly, citing from testimony by Professor Robert Blecker, Professor of Constitutional History of New York Law School, which I will include with my own written testimony to this committee.

The first instance was in the case Cobb v. Beame, 1975, which involved a violation by members of the U. S. Labor Party of a 1917 New York City ordinance requiring the display of an American flag at all public assemblies "warranted by law", i.e., where sound amplification devices were employed. This ordinance had never been challenged since its adoption in 1917. U. S. Labor Party members had twice assembled without displaying the flag, had been arrested, and were scheduled to appeal in local criminal court in July, 1975.

Although this local criminal action was pending, and THE defendants had the clear opportunity immediately to have the constitutionality of the ordinance adjudicated by the State courts, at the last moment, Judge Pierce, a Federal district judge, issued a temporary restraining order enjoining the city from enforcing the ordinance. Judge Pierce justified this interference with the orderly constitutional process of the State system by the extraordinary claim that any single state decision would merely amount to a single determination as to the rights of the particular defendants, thereby leaving unsettled the constitutionality of the statute as such.

Two serious problems are presented by Judge Pierce's action. First, by this pre-emptive action on the part of a Federal court, Judge Pierce effectively blocked the state from deciding in the first instance the constitutionality of its own municipal ordinance. How does a state's highest court ever get the opportunity to declare any of its statutes violative of the United States Constitution except by the appellate process whereby, initiating in a single case, determination can be made whether a particular defendant's particular constitutional rights have been violated?

Secondly, this action, taken while two members of the U. S. Labor Party were awaiting prosecution in a state court would seem to evidence a disregard on the part of Judge Pierce of the U. S. Constitutional Plan which recognizes that sovereign power is divided between the Federal government and the State governments, and that each state shall be able to conduct its orderly judicial process without interference from the Federal judiciary.

Five years later, on March 13, 1980, Judge Pierce in Phillips v. Smith overturned the double murder conviction of William Phillips by issuing a writ of habeus corpus on the ground that the prosecutor had failed to inform the Judge or the defense attorneys that during the course of the trial one of the jurors, even though in the jury selection process had indicated that he was interested in a law enforcement career, applied for a job as an investigator in the New York County District Attorney's office.

This issue of possible juror prejudice was the focus of extensive post-trial hearings after which Justice Birns, the New York trial judge, held that Phillips had not been deprived of his constitutional right to an impartial trial by his peers, or otherwise been prejudiced. The New York State Appellate Division affirmed the conviction, and the highest State Court of Appeals rejected Phillips claims.

Although Judge Pierce himself specifically acknowledged that there was no supportable claim of actual prejudice, nevertheless, he ordered a re-trial based solely upon a doctrine of "implied bias", or what he labelled a "conclusive presumption of partialiality".

In a vigorous dissent from the affirmance of Pierce's actions Circuit Judge Van Graafeiland observed:

> Reprehensible conduct by a state prosecutor which has not deprived the defendant of a fair trial does not warrant Federal habeas corpus relief. . .New York State Supreme Court judges are obligated and fully qualified to supervise the trial conduct of state prosecutors. . .the purpose of habeas corpus 'is not punishment of society for the misdeeds of a prosecutor, but avoidance of an unfair trial to the accused'. (quoting Brady v. Maryland, U. S. Supreme Court, 1963.)

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Every judge, state or Federal, must, according to oath, conscientiously analyze the Constitution and apply it to cases at hand. It is essential that judges have a proper understanding of their role under the Constitutional plan, a vital sense of *federal restraint*, and a healthy respect for state and local autonomy

A judge who bases official decisions or actions on subjective presumptions of bias or partiality places himself in question as to his possession of that most vital requisite of judicial integrity--objectivity.

For these reasons we feel that Judge Pierce's actions in these matters deserve the closest scrutiny by this committee.

Respectfully submitted,

Lillian P. Koegler

Lillian P. Koegler.

November 13, 1981.

NEW YORK LAW SCHOOL
57 WORTH STREET
NEW YORK, N.Y. 10013
(212) [illegible]

This memorandum shows how Lawrence W. Pierce, a Federal District Judge has more than once proved himself willing, if not eager, to decide questions he ought not to reach.

Two decisions, taken together, clearly evidence Pierce's expansive understanding of his own power under the United States Constitutional Plan.

In *Cobb v. Beame*, New York City required that the American flag be displayed at all public assemblies "warranted by law", i.e., where sound amplification devices were employed. The ordinance had never been challenged since its adoption in 1917. U.S. Labor Party members twice assembled without displaying the flag, were arrested, and were scheduled to appear in local criminal court in July, 1975. Although this local criminal action was pending, and defendants had the clear opportunity immediately to have the constitutionality of the ordinance adjudicated by the *State* courts, at the last moment, Judge Pierce, a *federal* district judge, issued a temporary restraining order enjoining the city from enforcing the ordinance. He justified this interference with the orderly constitutional process of the State system by an extraordinary claim: that any single state decision, dismissing the pending prosecutions as violating defendants' constitutional rights, would merely amount to a single determination as to the particular defendants, thereby leaving unsettled the constitutionality of the statute as such.

This is absurd. How else does a state's highest court ever get the opportunity to declare any of its statutes violative of the United States Constitution except by an appellate process whereby a particular defendant's particular constitutional rights have been violated in a single case. The principle of the rule of law essentially stands for the proposition that many similar cases fall under a single rule, and the Constitutional Plan safeguards us all by safeguarding each.

Five years later, on March 13, 1980, Judge Pierce, in *Phillips v. Smith* issued a writ of habeas corpus and thereby overturned the double murder conviction of William Phillips on the ground that one of the jurors, during the course of the trial, applied for a job as an investigator in the New York County D.A.'s Office, and that the prosecutor informed neither the Judge nor defense attorneys of that fact. (During the voir dire, however, the juror himself had indicated that he was interested in a law enforcement career as an investigator and had a pending application with the Drug Enforcement Administration.)

This issue of possible juror prejudice was the focus of extensive post-trial hearings after which Justice Birns, the New York trial judge, held that Phillips had not been deprived of his constitutional right to a trial by an impartial jury of his peers or otherwise prejudiced. The New York State Appellate Division affirmed the conviction, and the highest State Court of Appeals rejected Phillips' claims.

Although Judge Pierce himself specifically acknowledged that there was no supportable claim of *actual* prejudice, nevertheless, he ordered a retrial based solely upon a remarkable doctrine of "*implied* bias" or what he also labels a "conclusive presumption of partiality."

In short, as the United States Supreme Court held in 1974, in *Donnelly v. DeChristoforo*, a federal judge must not allow his personal dissatisfaction with prosecutors' errors of judgment to masquerade as constitutional commands, absent a denial of due process to the defendant. As Circuit Judge Van Graafeiland also observed in a vigorous dissent from the affirmance of Pierce's actions:

> Reprehensible conduct by a state prosecutor which has not deprived the defendant of a fair trial does not warrant federal habeas corpus relief . . . New York *State* Supreme Court *judges are obligated and fully qualified to supervise the trial conduct of state prosecutors* . . . . The purpose of habeas corpus 'is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused.' (quoting *Brady v. Maryland.*, U.S. Sup. Ct. 1963; emphasis added).

In *Phillips*, then, Judge Pierce singly nullified the collective decisions of the New York State Courts; in *Cobb* he effectively blocked the state from deciding in the first instance the constitutionality of its own municipal ordinance. In each case, he showed himself eager to usurp the essential role of the State judiciary under the Constitutional Plan.

This memo in no way is concerned with either the wisdom or constitutionality of New York City's flag ordinance, nor is it in any way an apology for the tactics of the state prosecutors. The merits of each case are arguable; but they were not for Pierce to argue.

It has been of the essence of the United States Constitutional Plan to recognize that Sovereign power is divided between a Federal Government and State governments, that the definition, detection, and prosecution of crime is primarily a matter of local concern. That each state shall be able to do it its own way without interference from an overarching, all-knowing, grasping Federal judiciary.

Every judge, state or federal, must, according to oath, conscientiously analyze the Constitution and apply it to cases at hand. Each judge has a different understanding of the exact panoply of rights which the Constitution guarantees the citizenry. A President and Senate should be very wary before making a candidate's particular understanding of specific clauses the basis of a judicial appointment. But one great issue, throughout the 200 years of Constitutional Republicanism, which every Chief Executive and U.S. Senate should properly emphasize in their appointed federal judiciary, is the judges' understanding of their role under that plan. While, historically, judges have differed, this nation originally had, and is again returning to, a vital sense of federal restraint and a healthy respect for state and local autonomy.

This nation has come to realize that the federal government in general, and the federal judiciary in particular, have, with well-meaning self-assurance, interfered in our lives too much. A Senate and President act entirely consistently with the independence of the judiciary, elevating only those who share this humility and self-restraint.

Robt Blecker

Robert Blecker
Professor of Constitutional History

Robert F. Salvia

Robert F. Salvia

Senator DeConcini. The next witness will be Mr. Howard Phillips, chairman of the Conservative Caucus? Is Mr. Phillips here?

[No response.]

Senator DeConcini. Mr. Melvin Blockinger? Mr. Blockinger.

Mr. Blockinger. I will pass up to you a few more pages that you are free to follow.

Senator DeConcini. Thank you, sir.

Mr. Blecker. Is it possible to stand to talk to you?

Senator DeConcini. I have no objection.

Would you raise your right hand, please, and be sworn?

Do you swear the testimony you are about to give the committee today is the truth, so help you God?

Mr. Blockinger. I do.

Senator DeConcini. Please proceed, Mr. Blockinger.

TESTIMONY OF MELVIN BLOCKINGER OF NEW YORK CITY

Mr. Blockinger. I would want you first, gentlemen, to understand where I——

Senator DeConcini. Mr. Blockinger, let me interrupt you. Excuse me. Due to time constraints, this hearing is going to be closed at 4 o'clock. That gives you about 6 or 7 minutes for your statement, sir. Please proceed.

Mr. Blockinger. It is going to be very difficult.

All right. If you will look at page 1, you will see where I fit into the picture. You see in the middle of the page, "John R. Patterson, et al. and intervenors"? On page 1. Your secretary has it; I submitted it.

Senator DeConcini. Where it says "Judge Pierce"?

Mr. Blockinger. Yes; "Basis for argument," in the center.

Senator DeConcini. OK.

Mr. Blockinger. Then it says, "John R. Patterson, et al." Those are minorities, mostly blacks in this case, and then it says, "and intervenors." That is me, mostly whites. We were all in the same job situation in this title 7 case and Lawrence Pierce heard the case.

Now you notice that the defendants were the Publishers' Association of New York and then the Newspaper and Mail Deliverers Union; those were the respondents. Now that shows you the picture of the case, where I am.

Judge Pierce heard this case in about 4 weeks and then he appointed an administrator to implement the consent decree. I will point you to page 2 at the bottom, the criminal background of this case. Page 2, do you see at the bottom, No. 3, "Respondents' criminal record and testimony in criminal proceedings"? Page 2.

Senator DeConcini. Is that it?

Mr. Blockinger. No, you see right up at the top it will say "page the second."

Senator DeConcini. No; I do not have that. I have "page the fifth" and "page the sixth."

Mr. Blockinger. Do you mean Duke Short did not give you the other? I sent 10 dollars' worth of mail.

Senator DeConcini. Well, that may very well be in the file. Here, do you want this back? We have them in the file, I am told.

Mr. **Blockinger**. No; you can have those. I could not get the post office to bring them down from New York in 2 days.

Now do you see where it says "Respondents' criminal record," No. 3?

Senator **DeConcini**. On page 2; yes, sir.

Mr. **Blockinger**. Yes; on the bottom of page 2: The union in this case has a president who is an admitted bribetaker to the U.S. attorney's office. His associates also are admitted bribetakers to the U.S. attorney's office. In a criminal trial this year the succeeding president of the union, as the defendant, was convicted by the jury and is now incarcerated.

On the employer's side of the picture in this criminal trial, one of the members of the Publishers' Association—you see them as the defendant/respondent, the Publishers' Association of New York—one of those employers testified in the criminal trial that he paid bribes.

I want to point out to you that both sides, the employer and the union, have acknowledged bribery between them. This is the situation where Lawrence Pierce takes over. There is also a homicide in here of one of the individuals.

The next point: Page 3, No. 4, "alleged payoff swindle." I would raise the question to this committee whether you feel that if there is between two conspirators an acknowledged bribery going on, whether you think that a sub rosa condition if existing should be carried over into a consent decree and made legal by Judge Pierce, or whether you would consider that that is incompetent.

Now this swindle, which I can show you by records of the union, I want to show you how the swindle was affected by a 20-percent discount.

Mr. **Short**. We will send someone down. If you will please keep your seat, we will send someone down to pick those up.

Mr. **Blockinger**. You will see the duplicate in the pay scale. Now in this swindle, the union president made a deal with the employers in which a 20-percent discount was made on salaries for certain individuals who were not members of the union. Those people constituted overwhelmingly the consent decree minorities, mostly blacks, and the consent decree nonminorities, mostly whites, of which I am one.

The beneficiaries of this payroll deduction were the employers, and I would suggest to you that this amounted to thousands and thousands of payroll hirings from a shape list over a period of 3 months, 6 months, and so on. These millions of dollars in this payroll windfall, arranged by the union president and the employers, went into a union contract and this contract also aborted title 7. However, the beneficiaries were the employers.

I want you to see the difference, about a 20-percent difference in the salaries. Also, this went on for years, and years, and years, and it was kept alive by various hurdles and various loopholes that kept these men from getting up into the higher pay scale. Also, these very men, when someone was out on vacation, someone was ill, someone was in an accident and not working, or if they just called and did not come in, these men filled in and did the regular man's job all the way through but at the 20-percent discounted wages and a discount on the overtime as well.

What you see in those two cards—the one card I think is 1973—those are the union's own materials—and the other card is 1980. This was millions of dollars to the employers, and the union officials have acknowledged that they like bribes. This is all in the U.S. attorney's files and even in a criminal case just concluded.

Incidentally, that president, Lachance—I have talked to his wife—I think that he was, as they say, railroaded in his criminal case in that I understand he did not get to bring a particular officer of the employer to testify in his behalf because the man allegedly was afraid he would lose his job. Also, an ambiguous question was put to this defendant in the witness chair, testifying for himself, and Judge Milton Pollock, two lawyers for the defendant, and the U.S. assistant attorney, Mr. Korn, all sat there and not one of them would make a move to have an ambiguous question restated.

Senator **DeConcini**. Thank you, Mr. Blockinger.

Mr. **Blockinger**. I would say those two points are enough, if they are substantiated, to have a retrial.

Senator **DeConcini**. Mr. Blockinger, if you would care to submit any other information, you may do so.

Mr. **Blockinger**. All right. Could I do it right in that record?

Senator **DeConcini**. No. We would ask that you write it and submit it to us. That is one of the rules that we have in the committee for hearing purposes. You can send it to the Judiciary Committee and I can assure you it will be placed in the file.

Mr. **Blockinger**. Could I ask if the investigator for the committee would confer with me?

Mr. **Short**. Yes, I would be glad do.

Mr. **Blockinger**. I would not want, if I had a choice, anyone in the U.S. attorney's office in New York. I would rather have your committee investigate it. I will come down to Washington and meet with them.

Senator **DeConcini**. I am not prepared to say that the committee will conduct an investigation but Mr. Short has agreed that he will visit with you and take some of your points into consideration.

Mr. **Blockinger**. All right. That is Mr. Short?

Senator **DeConcini**. Right here. Yes, sir.

Mr. **Blockinger**. Is he the committee counsel?

Senator **DeConcini**. He is the committee investigator for the nomination process and is directly responsible to the Chairman, Mr. Thurmond.

Mr. **Blockinger**. He is? Very good.

Senator **DeConcini**. Thank you, sir, for being with us today.

I understand there is another witness here, Mr. Robert Blecker. Please come forward.

Would you please raise your right hand?

Do you swear the testimony you are about to give today to the committee is the truth, so help you God?

Mr. **Blecker**. I do.

Senator **DeConcini**. Please proceed, Mr. Blecker.

TESTIMONY OF ROBERT BLECKER, PROFESSOR OF CONSTITUTIONAL HISTORY, NEW YORK LAW SCHOOL

Mr. **Blecker**. I will be as brief as I possibly can. I was suprised to hear much of my statement read by a previous witness, so I would only add a few points to place in perspective why I am vigorously against the confirmation——

Senator **DeConcini**. Excuse me. Just as a point of clarification, Mrs. Koegler stated that she was going to submit your testimony for you. That is the reason you were skipped over.

Mr. **Blecker**. Yes, sir. I appreciate that. No one was more surprised than I, however, to hear that. Therefore, I will not repeat it.

Senator **DeConcini**. Are you here as an individual, or are you representing the Conservative Caucus in opposition to this nomination, or what.

Mr. **Blecker**. No, I am here as a professor of constitutional history——

Senator **DeConcini**. Very good.

Mr. **Blecker** [continuing]. Who as a citizen is very sensitive to and upset by some of the actions by Judge Pierce.

In brief, in very brief, the great problem that has existed in politics for 25 centuries is to limit public officials and have them observe the proper limits on their own power. Two hundred years ago when we fought the American Revolution, we fought it over the principle that local governments should have the right to control their internal police, to define crimes and prosecute crimes, as well as to control their taxation.

That has remained a central position of the United States since the formation of the Union. When we had a Constitutional Convention, essentially we imposed or we decided upon a government of divided powers between the States and the Federal Government. Once again, the primary indication of sovereignty was for the States to define and prosecute their own crimes.

Occasionally in the course of history Federal judges have overstepped their limits and have failed to recognize that it is a primary obligation for the State judiciary, in the first instance and in all instances other than that which involve central Federal constitutional rights, to not only define and prosecute crimes and oversee the definition and prosecution of crimes but to vindicate defendants' constitutional rights.

As I said, occasionally Federal judges have overstepped them. Judge Pierce is one such judge, and the two cases under discussion previously by him in his testimony and then later by witnesses, again in opposition to his elevation, in those two cases he has done it, he has overstepped those limits.

Now without taking too much of the committee's time, I would just like to point out that in Judge Pierce's testimony earlier today when he was discussing *Cobb* v. *Beame,* his flag case, that the initial issue—and this is close to a direct quote—"The initial issue that I was confronted with was whether the statute was constitutional." The point of my opposition to his elevation to the second circuit is that the initial issue that he faced was not whether the statute under review was constitutional; the initial issue that he faced was whether he had the right to decide whether the statute was unconstitutional.

He had no right to make that decision. There was presently a State prosecution pending at that moment in which the constitutional rights of the defendants would be raised, in which the constitutionality or not of the statute would arise and be judged upon, and then later be subjected to appeal. In short, he made an end run around the State's right to define and prosecute its crime consistent with the constitutional rights of defendants.

More egregiously, however, and more recently still in *Smith* v. *Phillips*, after an extensive, fair State hearing on the potential bias of a juror which found beyond a reasonable doubt that the juror was not in fact biased, Judge Pierce in a habeas corpus review admitted that the hearing was full, fair, and impartial, and while not refuting the State judge's claim as to any actual bias, instead presented an extraordinary doctrine of "implied bias."

In his testimony, earlier testimony today, Judge Pierce said that he did not recall when asked whether the implied bias claim had originally been offered by the defendants or whether he himself was the first to raise it. On reading the briefs from both sides and talking to members involved, it is my information and it is my belief that the implied bias claim was first raised by Judge Pierce, was not raised even by the defense attorney, and was raised to the surprise and shock and chagrin of the prosecution.

In fact, it is also my belief that Judge Pierce is the only judge in the United States of America of whom I am aware who in a habeas corpus proceeding has reversed a conviction on the grounds of implied juror bias which effectively conclusively presumes—that is, it is an irrebuttable presumption, no evidence to the contrary can lead him to conclude otherwise—no judge other than Judge Pierce then, in my impression, in this entire country in its entire judicial history has ever reversed a criminal case, has ever granted a writ of habeas corpus on the grounds of implied juror bias, once a State has already held an adequate, fair, and impartial hearing.

His decision was, as he pointed out, affirmed by a sharply divided second circuit. However, what he did not point out and what I would point out to the committee was that nobody on that second circuit, certainly not the dissent nor the majority, adopted his implied bias. Instead, what they did was address the actual constitutional rights of the defendant involved, and they found actual bias.

The short of it is, then, that Judge Pierce made two end runs around the State. Twice he took it upon himself questions he had no right to reach. It is not my purpose here to either agree with or quarrel with the decisions that he actually made; it is not my purpose here to determine or decide whether the statute in *Cobb* v. *Beame* was constitutional or whether William Phillips, convicted mass murderer, was in fact guilty.

The purpose of my opposition to his elevation, the reason I am here to oppose his elevation, is that he had in both instances no right to decide. He said quite correctly that we have to await the decision by the U.S. Supreme Court.

Senator DeConcini. Excuse me. Was his right to decide challenged in that appeal?

Mr. Blecker. In the habeas?

Senator DECONCINI. Yes.

Mr. BLECKER. Yes, it was.

Senator DECONCINI. He was not overruled as to the right to challenge?

Mr. BLECKER. Oh, excuse me. No, his right to decide was challenged in the circuit court on the habeas. His right to decide under a due process ground is conceded, that is, if he had found that there was actual jury bias.

Senator DECONCINI. However, no court has said he had no right to hold, as you contend that he had no right, that it was an end run. No court said it was an end run.

Mr. BLECKER. Yes, in dissent——

Senator DECONCINI. No, I am not talking about the dissent; I am talking about the decision. No court held as a majority decision that he had no right to do what he did and that in fact it was an end run.

Mr. BLECKER. No. That is correct. What the majority did was avoid the grounds on which he decided and instead——

Senator DECONCINI. Which means that they did not say that he did not have the right to do what he did.

Mr. BLECKER. That is correct. All they did was avoid the issue that he raised. The dissent criticized him for having done that.

He said near the conclusion of his testimony that we would have to wait to see what the U.S. Supreme Court would do to this case. What I would suggest to the committee is, at the very least, that they await to see what the U.S. Supreme Court does to his case.

My hope is, my prediction is, and my firm conviction is in studying the constitutional history of this Nation, that since we have come back to original agreements, we have come to realize again that the Federal Government in general and the Federal judiciary in particular have in the past, with well-meaning self-assurance, interfered in our lives too much.

Although a Senate and a President should be very careful before it refuses to elevate a judge on the basis of any particular interpretation of a constitutional provision or right, the one position which it is entirely proper for a Senate to inquire into on a Federal judge, on any judge, the single position on the basis of which it is entirely proper for a Senate to judge is that judge's role under the constitutional plan.

Respectfully, I claim that the two opinions that we have had before us, both in his testimony and in the testimony of others, clearly indicate that he lacks the essential humility and self-restraint that we must have in our Federal judiciary.

I would just add that I am most surprised and chagrined that the President of the United States should submit for elevation to perhaps the highest, most important Federal Court, the name of a judge who has shown himself to be, in action as well as word, directly at odds with the States rights philosophy which is an outcome of the election of 1980. I am equally surprised that the Senator from New York, who espouses that political philosophy, would also see fit to introduce the name of a judge who in these two cases has shown himself to be directly at odds with a healthy respect for the division of power between the Federal Government and the States.

Senator DeConcini. Professor Blecker, thank you very much. I cannot quite agree with you. It seems to me that the administration and President Reagan have submitted, on the whole, outstanding appointments. I have yet to be convinced that your conclusion about Judge Pierce is correct. Judge Pierce has been making decisions for 10 years and I do not think that a single unreversed decision can lead me to your conclusion.

However, with your statement and those of the other witnesses here, I feel an obligation to review the file. I certainly would hate to be held to a standard that in 10 years one might not make a decision that someone might disagree with on constitutional grounds. However, in this case the appellate court did not reverse him, so obviously so far he is right.

I do not see how we can hold up a nominee waiting for the U.S. Supreme Court to decide whether or not he was right or wrong on two decisions out of, I dare say, probably thousands of decisions he has held in the 10 years he has been on the Bench.

Mr. Blecker. I appreciate that. I would just point out two things. One is that in essence what he did as a Federal judge was to supervise the prosecution, and that is not appropriately a part of habeas corpus. The other thing is that while you are quite right in pointing out that he was affirmed on appeal, he was affirmed by a sharply divided Court and the majority itself rejected the implied bias.

Therefore, he remains to the best of my knowledge the only judge in the country to have used an implied bias to declare as a matter of law an irrebuttable presumption, after a full and fair and adequate hearing, and a State judge found beyond a reasonable doubt that there was no actual bias. He is to the best of my knowledge still, even after his affirmance, the only judge in the country to extend the habeas power that far.

Senator DeConcini. Yes, but the Court had before it the ability to reverse him on that and they did not do it.

Mr. Blecker. They did not need to. They found independent grounds for affirming——

Senator DeConcini. They either did not agree or they did not have the courage to do it. I do not know why they did not do it and neither do you, but we do know that they did not reverse him on that ground.

Mr. Blecker. They did not have to reverse him on the ground because they had alternative grounds to affirm him on, which they found, actual bias.

Senator DeConcini. However, they could have reversed him had they agreed with your proposition. I am sure you think they should have come to the conclusion that he acted further than the jurisdiction a Federal court has. They did not do that and your own testimony says that question was before them. They could have decided that.

Mr. Blecker. Well, they substituted another theory. However, the essence of my testimony is that even if you find that Judge Pierce is within his constitutional right, is within his rightful jurisdiction, he still has evidenced himself to be at one end of a legitimate spectrum.

Senator DeConcini. That could be.

Mr. **Blecker**. It is certainly appropriate to ask yourself, Is this the judge, is this the end of the spectrum that we want to elevate up to the second circuit? Is this the end of the spectrum that we think it is appropriate—given the 1980 elections and given a return to an understanding of States rights—is this the end of the spectrum that we want to impel further upward in the judicial system?

Senator **DeConcini**. Yes, and obviously the Senators from New York and the President of the United States seem to think so.

Mr. **Blecker**. We can only conclude that the President is such a busy person with so many things to do, that the judicial position of this particular judge must have escaped his attention.

Senator **DeConcini**. You do not think that Ronald Reagan has any idea of what this is all about?

Mr. **Blecker**. In this particular case, I am quite confident that he could not possibly understand these two positions that the judge has taken and, consistent with that, have entered his name in nomination for appellate judge.

Senator **DeConcini**. If he had this testimony before him, you do not think he would have submitted his name?

Mr. **Blecker**. I am quite convinced he would not.

Senator **DeConcini**. I am going to see that the testimony gets delivered to the President because I think it is important. I daresay I believe that President Reagan, with the advice of Counsel and the Attorney General, knew about this particular person well enough to submit his name here with confidence that he had the ability and the background and the judicial temperament. I would like to think that.

Now I could be mistaken but I like to think that when a President submits a nomination he has approved it himself. I know that is the way it was done under the Carter administration and I have every reason to believe that that is the way it is done here now. That the President does review these. They are obviously brought to him by the White House staff or by the Attorney General but indeed he does not let someone else make these appointments.

Mr. **Blecker**. Well, I would like to think so, too. It is just that it is so directly at odds with all of his expressions of a healthy respect for the rights of States and the independence of the State judiciary, and especially the primary obligation of the States to define and prosecute crimes and to protect the constitutional rights of all involved. It is in such direct contradiction to all of his statements that I would find it hard to believe that, were he aware of the actions of Judge Pierce, that he would nevertheless have submitted his name for elevation to perhaps the highest, most important circuit court.

Senator **DeConcini**. That is what some people said about Sandra O'Connor when her name was submitted here. They testified in the committee hearings that they could not believe that the President would submit such a person if he knew her. He did know her. He made that decision, I know, from talking to Judge O'Connor, and yet those people felt as you did that he could not possibly submit this person.

It was on a different issue, as you may recall what the issue was in particular, but I have to believe President Reagan knows what he is doing. I cannot say that I would agree with you that he does not know what these appointments are all about.

Mr. BLECKER. Oh, I believe he knows what he is doing in all that he oversees. As to Justice O'Connor, I express my delight that she is on the bench. However, I would also reaffirm the difference between challenging a judge on any particular interpretation of a particular clause of the U.S. Constitution, which I think it is inappropriate for the Senate to do and to base an elevation, a nomination on, as against one other question which is on a different level. That is not, "What is your particular interpretation of a particular provision of the U.S. Constitution?" It is, "What is your function and role as a Federal judge?" That is the one level on which the Senate appropriately, it seems to me, confirms or does not.

Here the issue, therefore, is not what is his particular interpretation of a statute or his particular interpretation of a particular right. I would never oppose or support a nominee on that basis. It is solely on the basis of, Does he have the adequate judicial restraint? Does he observe the limits, does he observe the rightful limits of his own power? The answer that we get from these two cases is no, he does not. He sees as his initial question——

Senator DECONCINI. Well, given that someone might agree with you that in these two cases the answer is no, what about the rest of his judicial career of 10 years?

Mr. BLECKER. I must confess I am not an expert on the rest of his judicial career. I am solely responding to two prominent cases which establish a very small—but do establish—a pattern.

Senator DECONCINI. However, out of 10 years serving as a judge, these are the two cases and the two reasons you feel that he ought not to be confirmed.

Mr. BLECKER. Yes.

Senator DECONCINI. Thank you.

[Subsequent to the hearing, the committee received, for the record, material pertaining to the two court cases discussed, and can be found beginning on page 53.]

Senator DECONCINI. Are there any other witnesses who care to testify?

[No response.]

Senator DECONCINI. If not, this hearing will be closed.

[Whereupon, at 4:20 p.m., the committee recessed, to reconvene at the call of the Chair.]

BIOGRAPHIES

LAWRENCE W. PIERCE

NOMINEE, U.S. CIRCUIT JUDGE, SECOND CIRCUIT COURT OF APPEALS

Birth: December 31, 1924, Philadelphia, Pa.

Legal residence: New York.

Marital status: Married to Cynthia Straker Pierce, 3 children.

Education: 1942-43, 1946-48—St. Joseph's College, B.S. degree; 1948-51—Fordham University School of Law, LL.B. degree.

Bar: 1951—New York.

Military Service: 1943-46—U.S. Army, honorably discharged as sergeant.

Experience: 1952-54—Legal Aid Society, New York City, staff attorney (Civil Branch); 1954-61—assistant district attorney, Kings County, N.Y.; 1956-61—civil practice in association with Lewis S. Flagg, III; 1961-63—deputy police commissioner, police department, New York City; 1963-66—New York State Division of Youth Director; 1966-70—State narcotic addiction control commission, chairman; 1970-71—State University of New York, visiting professor of criminal justice; 1971 to present—U.S. District Judge, Southern District of New York.

CLARENCE A. BEAM

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF NEBRASKA

Birth: January 14, 1930, Stapleton, Nebr.

Legal residence: Nebraska.

Marital status: Married to Betty Fletcher Beam, 5 children.

Education: 1947-51—University of Nebraska, B.S. degree; 1953-54, 1963-65—University of Nebraska College of Law, J.D. degree.

Bar: 1965—Nebraska.

Military service: 1951-53—U.S. Army.

Experience: 1965-71—Chambers, Holland & Dudgeon, associate (1965-68), partner (1968-71); 1971 to present—Knudsen, Berkheimer, Beam, Richardson & Endacott, partner.

JOHN BAILEY JONES

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF SOUTH DAKOTA

Birth: March 30, 1927, Mitchell, S. Dak.

Legal residence: South Dakota.

Marital status: Married to Rosemary Wermers Jones, 6 children.

Education: 1947-53—University of South Dakota, B.S. degree 1951, LL.B. degree 1953.

Bar: 1953—South Dakota.

Military service: 1945-47—U.S. Navy, seaman first class.

Experience: Summer 1953—county judge, Lyman County, Kennebec, S. Dak.; 1953-62—private practice, Presho, S. Dak.; 1954-56—county judge, Lyman County; 1956-60—representative, South Dakota House of Representatives; 1962-66—Jones & McKeever, Presho, S. Dak.; 1966-67—Private practice, Presho, S. Dak.; 1967-74—circuit judge, 10th Judicial Circuit of South Dakota, Kennebec, S. Dak.; 1974 to present—circuit judge, 6th Judicial Circuit of South Dakota, Kennebec, S. Dak.

EMMETT RIPLEY COX

NOMINEE, U.S. DISTRICT JUDGE, SOUTHERN DISTRICT OF ALABAMA

Birth: February 13, 1935—Cottonwood, Ala.

Legal residence: Alabama.

Marital status: Married to Ann Haas Cox, 2 children.

Education: 1953-57—University of Alabama, A.B. degree; 1956-59—University of Alabama Law School, LL.B. degree.

Bar: 1959—Alabama.

Military service: 1958-64—Air National Guard, honorable discharge.

Experience: 1959-64—Mean & Norman, associate; 1964-70—Gaillard, Wilkins, Smith & Cox, associate 1964-65, partner 1965-70; 1970 to present—Nettles, Cox & Barker, partner.

CYNTHIA HOLCOMB HALL

NOMINEE, U.S. DISTRICT JUDGE, CENTRAL DISTRICT OF CALIFORNIA

Birth: February 19, 1929—Los Angeles, Calif.

Legal residence: California.

Marital status: Widow, 2 children.

Education: 1947-48—University of Geneva; 1948-51—Stanford University, A.B. degree; 1950-51—Stanford University Law School; 1951-53—George Washington University Law School; 1953-54—Stanford University Law School, LL.B. degree; 1959-60—New York University Law School, LL.M. degree.

Bar: 1954—Arizona; 1956—California.

Military service: 1951-53—U.S. Navy, lieutenant (j.g.).

Experience: 1955-59—generally did not practice, married with young child, *pro bono publico* basis, Legal Aid, Phoenix, referee, juvenile court in Phoenix; 1959—Valley National Bank, trust department, attorney; 1960-64—Department of Justice, Tax Division, trial attorney; 1964-66—Treasury Department, Office of Tax Legislative counsel, attorney-adviser; 1966-72—Brawerman & Holcomb, partner, Beverly Hills, Calif.; 1972 to present—U.S. Tax Court, judge.

William R. PHILLIPS, Petitioner,

v.

Harold J. SMITH, Superintendent, Attica Correctional Facility, Respondent.

No. 79 Civ. 1782.

United States District Court,
S. D. New York.

March 13, 1980.

Petitioner sought writ of habeas corpus claiming that he did not receive fair trial as one of members of jury, during course of trial, sought some benefit from prosecutor's office. The District Court, Pierce, J., held that where it was reasonable to conclude that average person in juror's position would believe that verdict of jury would directly affect evaluation of his job application, and where prosecutor was aware of this fact during trial but did not communicate it to defense counsel or to state court until after a verdict of guilty was returned, petitioner was entitled to habeas relief, despite lack of evidence of actual bias.

So ordered.

1. Constitutional Law ⇨267

Federal constitutional right in a criminal prosecution to a trial by an impartial jury is binding not only upon federal courts, but also upon individual states through due process clause of the Fourteenth Amendment. U.S.C.A.Const. Amends. 6, 14.

2. Jury ⇨97(1)

Issue of jury bias in criminal trial involves mixed questions of law and fact for which there is no single determinative test. U.S.C.A.Const. Amends. 6, 14.

3. Jury ⇨133

Upon a showing by a defendant that a claim of actual bias is more than mere conjecture, court will review trial record for objective evidence of prejudice or the lack thereof, such as explicit assertions of partiality or of impartiality by suspected juror, to determine validity of such claim. U.S.C.A.Const. Amends. 6, 14.

4. Jury ⇨132

Where there is insufficient evidence of actual juror bias, court may nevertheless find that juror occupies a status or is a party to a relationship which, as a matter of law, raises presumption of partiality; this presumption is conclusive and may not be defeated by affirmations of neutrality by the juror. U.S.C.A.Const. Amends. 6, 14.

5. Jury ⇨97(1)

In adjudging a claim of implied jury bias, court must determine whether average man in position of juror in controversy would be prejudiced; where, as in reviewing a claim of actual jury bias, court must determine whether evidence produced supports conclusion that juror was in fact partial. U.S.C.A.Const. Amends. 6, 14.

6. Habeas Corpus ⇨85.5(12)

Evidence was insufficient to support a finding that juror was actually partial to state's criminal case because of his desire to obtain employment with the state and, thus, habeas corpus petitioner's petition would not be granted on grounds of actual bias. 28 U.S.C.A. §§ 2241, 2254; U.S.C.A.Const. Amends. 6, 14.

7. Jury ⇨83(3)

Mere current governmental employment of a juror, unrelated to circumstances of criminal prosecution, is not sufficient to raise a conclusive presumption of jury bias and similarly, former government employee is not barred from serving as juror merely because of his prior employment. U.S.C.A. Const. Amends. 6, 14.

8. Habeas Corpus ⇨25.1(4)

Where it was reasonable to conclude that average person in juror's position of seeking employment as investigator with major felony unit in district attorney's office would believe that verdict of jury would directly affect evaluation of his job application, there was implied bias of juror and petitioner would be entitled to habeas corpus relief, despite lack of evidence of actual bias. U.S.C.A.Const. Amends. 6, 14.

William M. Kunstler, New York City, for petitioner.

Robert M. Morgenthau, Dist. Atty. for New York County, by Jerrold Tannenbaum, Robert M. Pitler, Asst. Dist. Attys., New York City, for respondent.

PIERCE, District Judge.

OPINION AND ORDER

This petition for a writ of habeas corpus presents this Court with the serious question of whether a defendant charged with capital crimes in state court can receive a *fair trial* where one of the members of the jury, during the course of the trial, sought some benefit from the prosecutor's office and where this fact became known to the prosecutor during the trial but was not communicated to defendant's counsel or to the court until after a verdict of guilty had been returned.

Petitioner William R. Phillips was convicted after a trial before a jury in State Supreme Court, New York County, on November 21, 1974, on two counts of murder and one count of attempted murder. He is presently serving concurrent sentences on those charges of up to a life term of imprisonment. He has petitioned for a writ of habeas corpus pursuant to sections 2241 and 2254 of Title 28, United States Code. In support thereof, he contends, first, that he was denied his constitutional right to a trial by an impartial jury and, therefore, to due process of law in that a member of the jury had applied for employment with the prosecutor's office during the course of the trial, which application, to the knowledge of the prosecutor, was still pending at the time the jury rendered its verdict against him. He further asserts that a second juror, while serving on the jury in this case, had agreed to testify on behalf of the prosecution in another, unrelated criminal action in exchange for immunity from prosecution for himself, petitioner not having been informed of this fact until the end of the prosecution's case against petitioner. Finally, petitioner contends that a tape recording of a conversation in which he was a participant should not have been admitted into evidence at his trial because he had previously been granted transactional immunity with respect to that conversation.

In the discussion that follows, petitioner's second and third contentions will not be addressed since this Court finds, with respect to his first contention, that the fundamental constitutional requirements of a trial before an impartial jury and of due process of law were denied to petitioner based upon the undisputed fact that a juror filed an application for a job in the prosecutor's office after being selected to serve on the trial jury in this case, which application was still pending at the time the jury rendered its verdict. The Court notes that the prosecuting attorneys became aware of this information during the trial but did not reveal it to either the defendant or the trial court until after a verdict was rendered. The Court notes further that this issue might well have been avoided if the prosecuting attorneys had timely informed the trial judge of this matter since alternate jurors were available to replace this juror/job applicant before deliberations began.

FACTS[1]

On March 29, 1972, petitioner was indicted on charges of murder and attempted murder. Thereafter on June 28, 1972, the first trial of petitioner on these charges was commenced in State Supreme Court, New York County. However, on August 9, 1972, the jury informed the court that it was unable to reach a verdict, and a mistrial was declared. Petitioner's second trial before a jury was commenced on September 16, 1974, before Justice Harold Birns. On November 21, 1974, the jury returned a verdict convicting petitioner of two counts of murder and one count of attempted murder. Both trials were prosecuted by the New York County District Attorney's Office.

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[1] During the post-trial hearings before Justice Harold Birns in state court on petitioner's motion to vacate the verdict of the jury on the grounds of jury and prosecutorial misconduct, the testimony of all of the persons involved in the incidents set forth in the petition before this Court was taken. Inasmuch as the parties are in substantial agreement regarding the events in controversy, a separate hearing was not held by this Court on the present petition. The events described herein have been established from the record of the criminal proceedings against the petitioner in state court, including post-trial hearings.

During the course of the second jury trial, one of the jurors, John Dana Smith, was informed by one Rudy Fontaine of possible employment opportunities in the Major Felony Program of the New York County District Attorney's Office. At that time, Fontaine was a uniformed court officer of the same state court in which petitioner was on trial, but was not involved in the ongoing proceedings against the petitioner. Fontaine knew that Smith had an interest in law enforcement; he also knew that Smith was a juror in the Phillips trial. During the jury selection process Smith had revealed that he was interested in law enforcement and had applied for a position with the federal Drug Enforcement Administration.

With Smith's consent, Fontaine began to inquire about employment opportunities with the New York County District Attorney's Office on Smith's behalf, as well as his own. He spoke to Michael Mulderrig, an investigator in the District Attorney's Office whom he knew, about applying for a position. Fontaine was told that he should apply for a position by submitting a letter and a resume to the District Attorney's Office by hand or by mail. The record of this matter, including the post-trial hearings held by Justice Birns at which the testimony of these persons was taken, is inconclusive as to whether Fontaine mentioned to Mulderrig either Smith's name or the fact that Smith was a juror in a pending criminal action.

Fontaine also spoke to a jury warden for the New York State Supreme Court, one Mario Piazza, to inquire if he knew where an employment application should be submitted. Piazza in turn spoke to an assistant district attorney, one John Lang, and was told that employment applications should be sent to the District Attorney's Office. Piazza did not know the names of the prospective applicants at that time and did not, therefore, mention Smith's name. However, he later met Smith, while petitioner's trial was underway, at a lunch with Fontaine.

On or about October 22, 1974, Smith drafted a letter and resume pursuant to Fontaine's instructions.[2] He gave these to Fontaine in an unstamped envelope for delivery to the District Attorney's Office. Smith stated at the post-trial hearings before Justice Birns that he assumed that Fontaine had a personal contact in the District Attorney's Office and that Fontaine would personally hand-deliver the envelope to that person when Fontaine submitted his own application. (Hearing Transcript at pp. 71–72). He further stated that he did not expect that Fontaine would influence the evaluation of his application through any of Fontaine's contacts within the District Attorney's Office. He did later, however, seek the help of a former job supervisor, Wallace Reilly, *infra*, whose acquaintance with members of the District Attorney's Office, Smith hoped, would be beneficial. (Hearing Transcript at p. 73).

Fontaine thereafter personally delivered his own application to the District Attorney's Office. However, when he offered the envelope containing Smith's application, he was told that it should be addressed and mailed to Richard Kuh, the District Attorney. Fontaine subsequently stamped and mailed the envelope as directed.[3]

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[2] The letter itself did not indicate that Smith was a member of the Phillips' jury. It was addressed to District Attorney Richard Kuh, and dated October 23, 1974. It stated:

"I understand that a Federal Funded investigation unit is being formed in your office to investigate major felonies. I wish to apply for a position as an investigator. Attached is my resume. Letters of recommendation will be furnished upon request. Thank you for your consideration."

[3] The letter with resume was received by the District Attorney's Office on or about October

Several days later, Fontaine met with Smith and Piazza for lunch, at which time Piazza informed Fontaine about Smith's application having been submitted. That afternoon or the next day, Piazza called Fontaine and told him that an Assistant District Attorney by the name of Sudolnik was responsible for reviewing applications for employment in the Major Felony Program for which Smith had submitted an application and that Smith should call her. Fontaine apparently relayed this information to Smith. It appears that, at the time of his last telephone conversation with Fontaine, Piazza was not aware that Smith was a juror in an ongoing criminal proceeding in state court.

In late October or early November, 1974, after Smith's employment application had been submitted, Assistant District Attorney Holmes was approached by Fontaine and informed that a person serving as a juror in the Phillips case had applied for a position with the District Attorney's Office. He may also have been asked if he would do something about the application, to which request, Holmes contended at the post-trial hearings, he initially indicated that he would check and see if an application had been filed. However, Holmes further contended, when he realized that the applicant was a juror, he became alarmed and told Fontaine that he would not contact Smith and that the application would not be processed. Fontaine contends that Holmes stated that he did not think that it was improper for a juror to apply for a position with the District Attorney's Office. Regardless of what was actually stated, it is clear from the record that Fontaine informally inquired about Smith's application. This event apparently took place both without Smith's actual knowledge and before the verdict was rendered in the state criminal proceeding.

Fontaine was not the only person to discuss the position for which Smith had applied with members of the District Attorney's Office. Piazza, the jury warden, spoke on separate occasions with Assistant District Attorneys Lang and Holmes concerning the position. On one occasion, he asked Lang whether the position had been filled. Smith's name apparently was not mentioned. In two conversations with Holmes, he also inquired about the position. At the post-trial hearings before Justice Birns, Piazza testified that he did not mention Smith's name. Holmes testified, however, that Piazza mentioned Smith's name and asked him to see if Smith had applied for employment. Holmes replied that Smith was on the Phillips' jury and that the application would not be processed. He also advised Piazza not to have any contact with Smith. These three inquiries took place before a verdict was rendered.

Sometime thereafter, Holmes notified Assistant District Attorney Sudolnik, who was responsible for reviewing employment applications for the Major Felony Program, of Smith's application and the fact that he was a member of the Phillips' jury. The prosecuting attorneys, Jack Litman and Phillip LaPenta, were informed of the situation on or about November 14, 1974, and steps were taken thereafter to ensure that Smith would not be contacted by any member of the District Attorney's Office.

Upon being notified of Smith's application for employment, Litman and LaPenta conferred about whether defense counsel or the trial court should be informed. The trial, at that time, had not yet concluded. They reasoned that since Smith had indicated during the voir dire that he was interested in a career in law enforcement as an investigator and had a pending application with the federal Drug Enforcement Administration, this incident was not surprising or unexpected. Therefore, they assumed, so long as they did not contact the juror and did not gain any knowledge about his background which was unknown to the defense, they were not obligated to bring this matter to the attention of the Court or defense counsel.

On November 20, 1974, the jury retired to deliberate. At that time, three alternates

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23. 1974 and was routinely referred to Assistant District Attorney Conboy. It was eventually submitted to Assistant District Attorney Sudolnik.

were available and could have been used as substitute jurors for Smith. (Trial Transcript at p. 6156). The next day, on November 21, 1974, the jury rendered its verdict convicting the petitioner. Neither the court nor defense counsel was yet aware that Smith had applied for employment with the District Attorney's Office or that various contacts had been made with members of that office by persons interested in promoting Smith's application.

At the time the jury rendered its verdict, Smith's employment application was still pending. He had not been invited to an interview nor had he been informed of the status of his application. Having been previously informed by Piazza through Fontaine that he should contact Assistant District Attorney Sudolnik about his application, Smith attempted to contact her by telephone the day after the jury's verdict was rendered. She was not available at the time he called, however, and did not return his call. He then called his former supervisor, Wallace Reilly, under whom he had worked in the past while employed as a guard at a department store. Reilly apparently knew several of the assistant district attorneys, and Smith asked him to inquire on his behalf. Reilly called Sudolnik and told her that Smith had worked for him and had done a good job. The fact that Smith had been a juror in the Phillips' case was also mentioned. She replied that Smith would be interviewed as would a number of other applicants and that the final selection was to be made by the New York City Bureau of Personnel and not the District Attorney's Office.

On December 9, 1974, District Attorney Richard Kuh informed the court that Smith had applied for employment during the pendency of the trial and that the two assistants had been approached regarding the application. Petitioner's defense counsel moved to vacate the verdict of the jury on the grounds of jury misconduct and prosecutorial misconduct. Justice Birns then held post-trial hearings at which the testimony of numerous persons, including Smith, was taken to establish a record of the events which occurred. Smith testified that while serving as a juror he did not consider whether the verdict would affect his application either favorably or unfavorably and that he did not think that it was improper to apply for employment when he did or that it was necessary to inform the court of his application.

Upon conclusion of the hearings, Justice Birns held that petitioner had not been deprived of his right to a trial before an impartial jury or otherwise prejudiced. Petitioner was then sentenced. On appeal, petitioner's conviction was affirmed without opinion. *People v. Phillips,* 52 App. Div.2d 758, 384 N.Y.S.2d 715 (1st Dep't). Thereafter, the New York State Court of Appeals denied leave to appeal. *People v. Phillips,* 39 N.Y.2d 949, 386 N.Y.S.2d 1039 (1976).

Having exhausted all available state remedies, petitioner commenced this action for a writ of habeas corpus on April 5, 1979. *Johnson v. Metz,* 609 F.2d 1052 (2d Cir 1979).

DISCUSSION

[1] The Sixth Amendment to the U. S. Constitution provides that a defendant in a criminal prosecution has a right to a trial by an impartial jury. This federal constitutional right is binding not only upon the federal courts, but also upon the individual states through the due process clause of the Fourteenth Amendment. *Duncan v. State of Louisiana,* 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

The determinative issue here is petitioner's claim that he was denied his constitutional right to a trial before a panel of impartial jurors. The gravamen of his claim is the prejudice he contends he suffered as a result of a juror having applied for employment with the prosecuting attorney's office during the course of his trial, which application was still pending during the period of the jury's deliberations. The problems caused by this event were further exacerbated by the failure of the prosecuting attorneys to promptly notify the court and defense counsel of these circumstances before the conclusion of trial and before the jury began its deliberations. Indeed, this Sixth Amendment constitutional challenge of the criminal conviction might have been avoided by prompt notification to the trial court and defense counsel and timely substitutional of one of the three available alternate jurors for Juror Smith before the jury commenced its deliberations.

Test of Jury Bias

[2] The issue of jury bias in a criminal trial involves mixed questions of law and fact, *Reynolds v. United States*, 98 U.S. 145, 156, 25 L.Ed. 244 (1878), for which there is no single determinative test. As stated in *United States v. Wood*, 299 U.S. 123, 146, 57 S.Ct. 177, 185, 81 L.Ed. 78 (1936):

> "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and procedure is not chained to any ancient and artificial formula."

[3] In reviewing such claims, the federal courts have distinguished between those actions which involve claims of actual jury bias and those involving implied bias. Actual bias may be said to exist where there is sufficient evidence of a juror's prejudiced state of mind. *United States v. Haynes*, 398 F.2d 980, 984 (2d Cir. 1968), *cert. denied*, 393 U.S. 1120, 89 S.Ct. 996, 22 L.Ed.2d 124 (1969). Upon a showing by a defendant that a claim of actual bias is more than mere conjecture, the court will review the trial record for objective evidence of prejudice—or the lack thereof—such as explicit assertions of partiality or of impartiality by the suspected juror to determine the validity of such claim. *E. g., Mikus v. United States*, 433 F.2d 719 (2d Cir. 1970).

[4] Where there is insufficient evidence of actual juror bias, the court may nevertheless find that a juror occupies a status or is a party to a relationship which, as a matter of law, raises the presumption of partiality. This presumption is conclusive and may not be defeated by affirmations of neutrality by the juror. *United States v. Haynes, supra*, 398 F.2d at 984.

The common law, see Blackstone's *Commentaries on the Law of England*, Bracton on the *Laws and Customs of England*, and *United States v. Burr*, 25 Fed.Cas.P. 49, 50 (14,692g) (C.C.Va.1807), provides the foundation for the formulation of the test for implied jury bias which is presently followed by the federal courts, the "average man" test. *Dennis v. United States*, 339 U.S. 162, 176, 70 S.Ct. 519, 527, 94 L.Ed. 734 (1950) (Black, J., dissenting); *United States v. Haynes*, 398 F.2d at 985. As set forth in *Tumey v. Ohio*, 273 U.S. 510, 532, 47 S.Ct. 437, 444, 71 L.Ed. 749 (1926):

> "[E]very procedure which would offer a possible temptation to the *average man* . . . to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law." (Emphasis supplied).

[5] Accordingly, in adjudging a claim of *implied* jury bias this Court must determine whether an average man in the position of the juror in controversy would be prejudiced. Whereas, in reviewing a claim of *actual* jury bias, the Court must determine whether the evidence produced supports the conclusion that the juror was in fact partial.

Actual Bias

The record of the post-trial hearings in state court indicates that Juror Smith was not a passive, indifferent applicant for employment. Indeed, his active interest in the position he sought is manifest from his request that Fontaine obtain information for him about the position, from his immediate drafting of a resume and cover letter pursuant to Fontaine's instructions, from his efforts to contact Assistant District Attorney Sudolnik about the job after the trial was concluded, and from the efforts of his former supervisor, Wallace Reilly, to contact the District Attorney's Office at Smith's request. Moreover, since he had applied for the position of an investigator with the Major Felony Unit of the prosecutor's office while sitting as a juror in a criminal case involving a capital offense, it appears initially that petitioner's claim of actual jury bias is not mere unfounded speculation.

[6] However, a further review of the record indicates that there is insufficient evidence to support a finding that Smith was actually partial to the State's case because of his desire to obtain employment. At the post-trial hearings before Justice Birns, Smith testified, in substance, that he was not influenced by his pending employment application and that he did not attempt to influence the other members of the jury. Although efforts were made by Piazza and Fontaine to contact members of the District Attorney's Office to urge that Smith be employed, Smith apparently was unaware of these solicitations and had not requested that such efforts be undertaken on his behalf. Further, the personal inquiries which he made himself and the efforts of Reilly which were made at his request did not occur until after the jury had rendered its verdict. Justice Birns who had observed the demeanor of all of the witnesses, including Smith who testified at the post-trial hearing concerning this issue, and who had the opportunity to observe Smith throughout the trial, concluded that Smith's judgment was not influenced by these circumstances.

Therefore, since petitioner has had ample opportunity to adduce evidence of actual prejudice, the Court finds that the record of this matter does not support petitioner's claim that Juror Smith was *actually* partial to the prosecution's case because he was seeking to obtain employment.

Implied Bias

[7] In determining whether *implied* jury bias existed, the Court is mindful that it should not "create a set of unreasonably constricting presumptions that jurors [are impliedly biased because of] certain occupational or special relationships which might bear directly or indirectly on the circumstances of a given case . . . . . ." *Mikus v. United States*, 433 F.2d 719, 724 (2d Cir. 1970). For example, it is clear that mere current governmental employment of a juror, unrelated to the circumstances of a criminal prosecution, is not sufficient to raise a conclusive presumption of jury bias. *United States v. Wood*, 299 U.S. 123, 57 S.Ct. 177, 81 L.Ed. 78 (1936); *Frazier v. United States*, 335 U.S. 497, 69 S.Ct. 201, 93 L.Ed. 187 (1948). Similarly, a former government employee is not barred from serving as a juror merely because of his prior employment. *Mikus v. United States*, *supra*, 433 F.2d at 724.

In determining that current or former government employees are not disqualified from serving as jurors as a matter of law, the Courts have reasoned that government employees have no different interest in a criminal matter than that of "any citizen who wishes to see crime properly punished." *United States v. Wood*, 299 U.S. at 149, 57 S.Ct. at 187. Nonetheless, it has been implied that exceptional circumstances may exist which would warrant a finding of inherent prejudice based on the employment affiliation of a juror. *Id.* at 150, 57 S.Ct. at 187; *Frazier v. United States*, 335 U.S. at 510, 69 S.Ct. at 208.

The reasoning of the Court in *Frazier* and *Wood* is consistent with the average man test set forth in *United States v. Burr*, *supra*, and *Tumey v. Ohio*, *supra*. *See Dennis v. United States*, 339 U.S. 162, 177, 70 S.Ct. 519, 527, 94 L.Ed. 734 (1950). Under this test, the average person employed by the government would not be held to be prejudiced against a defendant in a criminal prosecution, as a matter of law, because of that employment, absent exceptional circumstances.

[8] But prospective employment of a juror by the prosecutor's office as an investigator is not the type of circumstance addressed in *Frazier* or *Wood* and is not, in the opinion of this Court, governed by their holdings. In those cases, the jurors were current government employees whose work was not related in any significant way to the matter being tried. Here, Smith was seeking employment in a clearly definable context which was closely related to the matter being tried; he sought employment as an investigator with the Major Felony Unit in the District Attorney's Office while sitting as a juror in a homicide case then being prosecuted by that very office. Under these circumstances, it is reasonable to conclude that the average person in Smith's position would believe that the verdict of

the jury would directly affect the evaluation of his job application. Moreover, it would not be unreasonable for such a juror to assume that the prosecutor's office had reviewed his application and, in the process of reviewing his background, had become aware that he was a juror in a significant criminal trial it was then prosecuting, although his employment application did not so state. The Court notes that here the District Attorney's Office was in fact aware that Smith, a juror, had applied for employment, although it learned of this for reasons other than through its investigation of job applicants. Under these circumstances, reason suggests that a person would indeed be likely to favor the prosecution's position—at least to some extent.

This Court does not find that a conclusive presumption of partiality in this instance is unreasonably constrictive. No significant class of prospective jurors is likely to be affected. Furthermore, extrajudicial communications between jurors and the office of the prosecuting attorney should not be countenanced. *See Mattox v. United States*, 146 U.S. 140, 150, 13 S.Ct. 50, 53, 36 L.Ed. 917 (1892). Nor has counsel for the respondent contended that a finding of implied juror bias would constitute an unreasonable limitation.

The established principle of implied jury bias is founded in English common law and has been adopted by American courts. As Blackstone noted, a prospective juror should not serve when it is shown:

> "that [he] is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action pending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counsellor, steward or attorney, or of the same society or corporation with him." 3 Colley, *Blackstone Commentaries on the Laws of England* 363.

Similarly, Bracton states that if the defendant "suspects any of the twelve jurors he may remove him for just cause as where there are deadly enmities between some of them and the indicted man, or there is a greedy desire to get his land, as was said above; if there is ground for suspicion all are to be removed, that the inquiry may proceed free from all doubts." 2 Thorne, *Bracton on the Laws and Customs of England* 405 (1968). Our courts have frequently affirmed this tenet. Chief Justice Marshall stated in *United States v. Burr*, 25 Fed.Cas.P. 49, 50 (14,692g) (C.C.Va. 1807) that:

> "The relationship may be remote; the person may never have seen the party; he may declare that he feels no prejudice in the case, and yet the law cautiously incapacitates him from serving on the jury because it suspects prejudice, because in general persons in a similar situation would feel prejudice."

Accordingly, the Court finds that Juror Smith was not qualified to sit as a juror because of implied bias and should have been removed from the panel of jurors. The assistant district attorneys who prosecuted these serious criminal charges in state court must share the responsibility for this inexcusable abridgement of the petitioner's Sixth Amendment right. They were aware of this problem long before the jury retired to deliberate and failed to bring this matter to the attention of the trial court or defense counsel. Since three alternate jurors were available at the time, this controversy could likely have been avoided by the substitution of another juror for Smith.

For these reasons, the petition for a writ of habeas corpus is hereby conditionally granted unless retrial of the petitioner commences within ninety days of the entry of this order.

SO ORDERED.

Wesley COBB and Nereida Cordero, for themselves and all others similarly situated, Plaintiffs,

v.

Abraham BEAME, Individually and as Mayor of the City of New York, and Michael Codd, Individually and as Police Commissioner of the City of New York, Defendants.

No. 75 Civ. 3062.

United States District Court,
S. D. New York.
Sept. 30, 1975.

Action was brought under the 1871 civil rights statute, by members of a political party, for injunctive relief and a declaration that a city ordinance requiring that an American flag be displayed at assemblies and parades unconstitutionally infringes upon federally protected rights of free speech and assembly. The District Court, Pierce, J., held that the class action challenge involved political speech and basic civil and political rights, and where particular members who were plaintiffs had not been prosecuted in state court they were entitled to maintain the federal class action though other members of the party were under state court prosecution. The federal-state comity doctrine was not applicable, and where there was no possibility that state courts could decide the issue on a nonfederal ground abstention was inappropriate. For purposes of injunctive relief, plaintiffs appeared likely to prevail on the merits.

Preliminary injunction ordered.

1. Civil Rights ⇨13.3

Municipalities are not "persons" within 1871 civil rights statute, but statutory words "under color of any statute, ordinance, regulation, custom or usage, of any State or Territory" do not exclude acts of official or policeman who can show no authority under state law to support his actions. 42 U.S.C.A. § 1983.

See publication Words and Phrases for other judicial constructions and definitions.

2. Civil Rights ⇨13.1

Municipal ordinances and their enforcement may be challenged in actions under 1871 civil rights statute. 42 U.S.C.A. § 1983; Administrative Code N.Y. §§ 435–8.0, 435–8.0, subds. a–c.

3. Judgment ⇨828(3.32)

In strict sense, dismissal of state criminal complaint on ground of unconstitutionality of law allegedly violated is determination only of rights of defendant who is party thereto.

4. Courts ⇨262.4(10)
Declaratory Judgment ⇨128

Where class action mechanism was not part of state's method of enforcing laws, state prosecutions against certain members of political party did not offer "plain, speedy and efficient" remedy to other members, who were federal court plaintiffs alleging constitutional deprivations by reason of city ordinance.

5. Courts ⇨490

Class action challenge by political party members to validity, under Federal Constitution, of city ordinance requiring display of flag at political rallies involved political speech and basic civil and political rights, and where particular members who were plaintiffs in federal court suit had not been prosecuted in state court they were entitled to maintain the federal class action though other members of party were under state court prosecution; federal-state comity doctrine was not applicable. 42 U.S.C.A. § 1983; Administrative Code N.Y. §§ 435–8.0, 435–8.0, subd. b; 28 U.S.C.A. §§ 1343, 2201; Fed.Rules Civ.Proc. rule 23, 28 U.S.C.A.; U.S.C.A.Const. Amends. 1, 14.

6. Courts 🔑260.4

Where there was no possibility that state courts could decide issue on nonfederal ground and where deprivation of basic civil and political rights was alleged, abstention was inappropriate.

7. Injunction 🔑151

Where injunction would operate to hamper process of state law enforcement, it was necessary for court in passing upon application for temporary injunction not only to consider whether plaintiffs would suffer irreparable harm and whether there was substantial likelihood of plaintiffs' success on merits but also to weigh interests on both sides.

8. Injunction 🔑136(3)

Where plaintiffs were faced with alternative of foregoing exercise of First Amendment rights of free speech and assembly or of facing arrest, there was irreparable injury required for temporary injunctive relief. U.S.C.A.Const. Amend. 1.

9. Injunction 🔑137(4)

For purposes of temporary injunctive relief, plaintiffs appeared likely to prevail on the merits in their contention that city ordinance requiring display of flag at political rallies was violative of First Amendment rights and unconstitutional in placing impermissible conditions upon exercise of constitutional freedoms. U.S.C.A.Const. Amend. 1; Administrative Code N.Y. § 435–8.0, subds. a, c.

New York Civil Liberties Union by Paul G. Chevigny, New York City, of counsel, for plaintiffs.

W. Bernard Richland, Corp. Counsel New York City, by Elliot L. Hoffman New York City, of counsel, for defendants.

OPINION AND ORDER

PIERCE, District Judge.

This is a § 1983 civil rights action brought by plaintiffs Cobb and Cordero for injunctive relief and a declaration that a New York City ordinance, requiring that an American flag be displayed at assemblies and parades, unconstitutionally infringes upon federally protected rights of free speech and assembly.

On June 7, 1975, Paul Kreingold, a member of the steering committee of the New York City local of the U.S. Labor Party, was arrested at a rally for the Party for failure to have an American flag on display in violation of New York City Administrative Code § 435–8.0. On June 28, 1975, Robin Taub, another member of the U.S. Labor Party, was arrested for violation of the same ordinance. Present at that second rally was Nereida Cordero, also a member of the Party local and a plaintiff herein. Kreingold's summons was made returnable in the Criminal Court of the City of New York on July 8; Taub's summons was similarly returnable on July 28.

Plaintiffs Cobb and Cordero, both members of the New York local of the U.S. Labor Party, subsequently filed a complaint in this Court on June 24, 1975. The suit, characterized by plaintiffs as a class action, sought declaratory relief to the effect that § 435–8.0 of the Administrative Code is unconstitutional on its face and sought an injunction restraining defendants from the enforcement of that ordinance. On June 30, 1975, this Court issued to defendants an order to show cause why they should not be temporarily restrained from enforcing the ordinance against plaintiffs, and a hearing was set down for July 2, 1975. Following the hearing, this Court on July 3, 1975 entered a temporary restraining order enjoining defendants and their agents from enforcing the ordinance against the two named plaintiffs in this action, pending the determination of the motion for a preliminary injunction. That motion, based on undisputed facts, having been fully briefed by the parties, the Court determines that the preliminary injunction must issue as to the named plaintiffs herein.

According to affidavits supplied by plaintiffs, both Cobb and Cordero were scheduled to be deployed organizing, selling papers, and talking to people at rallies of the U.S. Labor Party scheduled in the weeks following the filing of the complaint herein and before the return dates of the state criminal summonses. However, as of the date of the complaint, neither plaintiff had been arrested for violation of the challenged ordinance, although their moving affidavit states a continuing fear that such arrests will be made. It is not disputed that members of the U.S. Labor Party have been warned several times of the requirement that an American flag be at their rallies and that there has been no attempt to comply with the ordinance.

Section 435–8.0 of the Administrative Code of the City of New York reads, in pertinent part, as follows:

> "*Public assemblies; display of flag.* a. All assemblies, warranted by law, held in any of the streets of the city, where public discussions are held, shall have the American flag, the dimensions of which shall be not less than thirty-six inches by forty-eight inches, conspicuously displayed at all times during the whole of such assembly and every parade or procession must have at or near its head the American flag, of similar dimensions, conspicuously displayed at all times during the formation of such parade or procession.
>
> * * * * * *
>
> "c. Any person or member of a group of persons who shall violate any provision of this section shall upon conviction thereof, be punished by a fine of not more than one hundred dollars or by imprisonment not exceeding ten days or both such fine and imprisonment."

Subsection (b) of the ordinance, prohibiting the display of certain other flags and banners, is not at issue in this case. According to the Corporation Counsel for the City, this action is the first to challenge the validity of the American flag requirement since its adoption by the Board of Aldermen in 1917.

Section 435–8.0 does not apply to all public assemblies; rather, it applies only to those "warranted by law", such as rallies at which a sound amplification device is employed. These are the type of assemblies which the U.S. Labor Party hold; see *United States Labor Party v. Codd,* 391 F.Supp. 920 (E.D.N.Y. 1975).

Discussion

[1, 2] Plaintiffs urge that this Court has jurisdiction over the present action by nature of 28 U.S.C. §§ 1343 and 2201, and the Court so concludes. This is an action to redress alleged deprivation of federally protected constitutional rights under the first and fourteenth amendments, brought against state officials pursuant to 42 U.S.C. § 1983.[1] Plaintiffs bring this action on behalf of "all others similarly situated" but at this juncture no class determination has yet been sought pursuant to Rule 23 Fed.R.Civ.P., it being clear to all parties, and to this Court, that the first issue to be determined is whether this suit can be

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[1] Although municipalities are not considered to be "persons" within the meaning of § 1983, the statutory words "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory" do not exclude the acts of an official or policeman who can show no authority under state law to support his actions. *Monroe v. Pape,* 365 U.S. 167, 172–87, 192, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). Municipal ordinances and their enforcement may be challenged in § 1983 actions; see *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 95 S.Ct. 2561, 45 L.Ed.2d 648 (1975).

maintained in federal court in light of the doctrine of *Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

Cognizant of the principle that comity with the several states is a fundamental component of this nation's federal system, Congress has long provided that a federal court may not interfere with pending state judicial proceedings. 28 U.S.C. § 2283. Congress enacted § 1983 as an exception to the Anti-injunction Statute for situations where constitutional rights are threatened with deprivation under color of state law. Yet, despite this exception, the course of recent decisions in the Supreme Court indicates that considerations of comity apply to § 1983 actions as well.

In *Younger v. Harris*, the Supreme Court held that a federal court may not enjoin a pending state criminal prosecution brought pursuant to a challenged state statute except under extraordinary circumstances such as bad faith prosecution and harassment by state enforcement agencies. In a companion case, *Samuels v. Mackell*, 401 U.S. 66, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971), the Court ruled that the same principles mandated the conclusion that declaratory relief as to a state law's constitutionality similarly is foreclosed to a state defendant. The essential consideration underlying these decisions and others reaching back to *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L.Ed. 714 (1908) was that a state judicial proceeding had already begun or was pending against the federal plaintiff. Thus, the federal system must remain

> "cognizant that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing prosecution would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts, 'to guard, enforce, and protect every right granted or secured by the constitution of the United States.'" (*Steffel v. Thompson*, 415 U.S. 452, 460–61, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974) (citations omitted).)

However, as the Supreme Court has frequently stated, when there are no state proceedings pending against the federal plaintiff, the considerations of comity do not apply with the same force. "Requiring the federal courts totally to step aside when no state criminal prosecution is pending against the federal plaintiff would turn federalism on its head." *Steffel v. Thompson, supra*, at 472, 94 S.Ct. at 1222; see *Lake Carriers Ass'n v. MacMullan*, 406 U.S. 498, 509, 92 S.Ct. 1749, 32 L.Ed.2d 257 (1972). This is the principle which plaintiffs urge controls the present case.

However, the concept that a federal plaintiff may overcome the bar of *Younger v. Harris* solely upon a showing that he has not been named in state court has been refined through more recent decisions of the Supreme Court. In *Steffel v. Thompson*, the Court examined the *Younger* doctrine in a case where the federal plaintiff, although not named in state court, had participated in the same actions which led to state prosecution of another. There petitioner Steffel and others had engaged in handbilling against the Vietnam situation on the premises of a private shopping center. After having left once under threat of arrest for criminal trespass, the protestors returned a few days later only to be warned again that arrest would follow. Petitioner Steffel left to avoid prosecution, but his companion was arrested by state authorities. Steffel then sued in federal court for an injunction and declaratory relief. In holding that Steffel was not barred by the rule of *Younger v. Harris*, the Court observed that when no state proceeding is pending against the federal plaintiff, federal intervention does not result in duplicative legal proceedings or disruption of the state criminal justice system. 415 U.S. at 462, 94 S.Ct. 1209.

Although the *Steffel* Court did not address the question of whether a federal plaintiff might be foreclosed by nature of the communality of his interest with that of the state defendant, that consideration was taken up in two decisions decided by the Supreme Court late last term.

In *Hicks v. Miranda,* 422 U.S. 332, 95 S.Ct. 2281, 45 L.Ed.2d 223 (1975), the owner of a motion picture establishment sued in federal court for an injunction and a declaration that four copies of a film owned by him had been improperly seized in state proceedings. Prior to the commencement of Miranda's federal action, state officials, acting pursuant to authorized warrants, had seized as obscene four copies of a film from Miranda's theater and had arrested two of Miranda's employees under the state obscenity statute. Miranda sued in federal court to have the law declared unconstitutional and the films returned, but he was added as a party defendant in the state proceedings after the filing of the federal action. In deciding that the district court erroneously had proceeded to the merits of the federal action, the Supreme Court observed that Miranda "had a substantial stake in the state proceedings . . . ." 422 U.S. at 348 95 S.Ct. at 2291. Speaking of Miranda and the other federal plaintiffs, the Court set forth a new aspect of the *Younger* doctrine.

> "Obviously, their interest and those of their employees were intertwined; and as we have pointed out, the federal action sought to interfere with the pending state prosecution." (422 U.S. at 348, 95 S.Ct. at 2291.)

The Court then noted that Miranda had been named as an additional party defendant in state court shortly after the filing of his federal complaint. Finding these two factors sufficient to distinguish the action from that brought in *Steffel v. Thompson,* the Court wrote:

> "[W]e now hold that where state criminal proceedings are begun against the federal plaintiffs after the federal complaint is filed but before any proceedings of substance on the merits have taken place in the federal court, the principles of *Younger v. Harris* should apply in full force." (422 U.S. at 349, 95 S.Ct. at 2292.)

Shortly thereafter, the Supreme Court had occasion to explore further the meaning of "intertwined" interests as it relates to the *Younger* doctrine. In *Doran v. Salem Inn, Inc.,* 422 U.S. 922, 95 S.Ct 2561, 45 L.Ed.2d 648 (1975), three drinking establishments engaged in presenting topless dancing filed a § 1983 action attacking a local ordinance banning any and all such entertainment; each bar had halted its topless entertainment after passage of the ordinance. After the district court refused to enter a temporary restraining order, one of the bars, M & L Restaurant, Inc., resumed the topless displays. A criminal summons promptly issued against M & L, but not against the two bars which had not resumed topless entertainment. The federal district court subsequently found the challenged ordinance to be unconstitutional on its face, and held that the $500 daily penalty for violation of the ordinance warranted the entry of injunctive relief. The district court ordered such relief as to all three plaintiffs, concluding that there was no compelling reason to distinguish between M & L and the other two bars on *Younger* grounds. *Salem Inn, Inc. v. Frank,* 364 F.Supp. 478 (E.D.N.Y.1973). The Court of Appeals for the Second Circuit affirmed, concluding that the interests of avoiding contradictory outcomes, of conservation of judicial energy, and of a clear-cut method of determining the application of *Younger v. Harris* all militated in favor of granting injunctive relief to all three bars. 501 F.2d 18 (2d Cir. 1974). The Supreme Court reversed as to M & L, stating that considerations of federal comity outweighed the fear of inconsistent results. 422 U.S. at 928, 95 S.Ct. 2561.

In so deciding, the Supreme Court not only rejected the conclusion of the Second Circuit that all three bars were free from the strictures of *Younger*, but the Court rejected as "equally Procrustean" the argument that the suit against M & L operated to foreclose the other two bars from suing in federal court.

> "While there plainly may be some circumstances in which legally distinct parties are so closely related that they should all be subject to the same *Younger* considerations which govern any one of them, this is not such a case—while respondents are represented by common counsel, and have similar business activities and problems they are apparently unrelated in terms of ownership, control and management. We thus think that each of the individual respondents should be placed in the position required by our cases as if that respondent stood alone." (422 U.S. at 928, 95 S.Ct. at 2566.)

The Court accordingly held that both declaratory and injunctive relief was properly afforded to the two federal plaintiffs who had not been sued in state court. Id. at 930, 95 S.Ct. 2561.

Thus, in both *Hicks v. Miranda* and *Doran v. Salem Inn*, the Supreme Court refused on grounds of comity to consider a suit by a federal plaintiff who had been added as a party defendant to a state criminal proceeding after the federal action had commenced but before proceedings on the merits had begun. In the former case, the Court found as an additional rationale the fact that Miranda was the owner of the films seized in the state proceeding and employer of the state defendants. This is the legal backdrop against which the present application for injunctive relief must be considered.

In this case there are two members of the U.S. Labor Party local who are presently awaiting prosecution in state court, and two separate members of the same Party local who are plaintiffs herein. Neither of the plaintiffs here have been sued in state court. This Court must enquire as to whether, despite the fact that they are not state defendants, the interests of these federal plaintiffs are so intertwined with those of the state defendants as to be adequately represented in the state court suit. If this Court was to take a narrow view of precedent, the simple fact that the plaintiffs herein are not defendants in state court would suffice to take this case out from under the rule of *Younger v. Harris*, in the manner in which *Steffel v. Thompson* was decided. Further, it could be argued that the statements in *Hicks* and *Doran* as to communality of interest were not vital to the decision of either of those cases, and that the fact of post-federal complaint prosecution in state court was dispositive. Indeed, *Doran* refused to expand the concept of *Hicks* that legally separate parties may be bound by the same comity considerations which bind any one of them.

[3, 4] It is clear so as not to require extended discussion that the present suits in state court cannot operate to vindicate the constitutional rights of the plaintiffs. In the strict sense, the dismissal of a New York State criminal complaint on the ground of the unconstitutionality of the law allegedly violated is a determination only of the rights of the defendant who is a party thereto. *414 Theater Corp. v. Murphy*, 499 F.2d 1155, 1158 (2d Cir. 1974). Further, the corporation counsel presents no state procedural mechanism by which the other members of the U.S. Labor Party voluntarily could join as party defendants in state court; New York does not employ the class action mechanism as a method of enforcing criminal laws. Assuming that a class was properly determined in the action in this Court, it would take three hundred state prosecutions to accomplish what the one federal class action might achieve; thus the

state cannot offer a "plain, speedy and efficient" remedy to the alleged deprivations herein. See *Georgia R.R. & Banking Co. v. Redwine*, 342 U.S. 299, 72 S.Ct. 321, 96 L.Ed. 335 (1952). The plaintiffs in this case and the defendants in state court, while sharing common interests, cannot be said to be as "intertwined" as were the owner of a theater and his employees in *Hicks v. Miranda*. The state defendants in *Hicks* were agents of the federal plaintiff; their acts were his acts. No such common "ownership, management or control" is present in this case.

[5] Further, this Court does not ignore the fact that this case involves political speech. *Hicks* and *Doran* both involved state obscenity prosecutions. Since elections are involved, this case deals with a right "preservative of other basic civil and political rights." *Reynolds v. Sims*, 377 U.S. 533, 562, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964); see *United States Labor Party v. Codd, supra*, 391 F.Supp. at 920. The Corporation Counsel urges this Court to apply the *Doran* principle and to decide that this is precisely the type of case where legally distinct individuals are to all be bound by the same *Younger* considerations which apply to any one of them. In the context of political speech and assembly, in the face of this city ordinance, and in light of the fundamental fact that neither of the plaintiffs herein have been sued in state court, this Court refuses to conclude that the Supreme Court opinion in *Doran* envisioned this type of situation. If this Court were to adopt the expansive reading of the *Hicks* holding and the *Doran* dicta urged by the Corporation Counsel, then a City could foreclose totally any federal constitutional challenge to an ordinance such as this one merely by prosecuting one individual among the many at whom the ordinance was directed. This result truly "would turn federalism on its head" and would impose an exhaustion requirement upon § 1983 actions, which the Supreme Court has refused to do. *Steffel v. Thompson, supra*, 415 U.S. at 472–73, 94 S.Ct. 1209. Further, it would constitute an abrogation of the paramount duty of the federal courts to protect constitutional rights. *Id.* at 473, 94 S.Ct. 1209; see *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622 (1963); *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

Accordingly, this Court holds that the principles of federal-state comity underlying *Younger v. Harris* and its progeny do not operate ~~to bar plaintiffs~~ Cobb and Cordero from this forum even though other members of the U. S. Labor Party are presently defendants in state court. *Doran v. Salem Inn, supra*, 422 U.S. at 928, 95 S.Ct. 2561.

[6] Nor is this an appropriate case for abstension. Plaintiffs' attack upon the ordinance is aimed at its face; there is no issue of vagueness or overbreadth here. There is no possibility that the state courts could decide this issue on a non-federal ground. In such circumstances, abstension is inappropriate. *Kusper v. Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973); *Zwickler v. Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *Baggitt v. Bullitt*, 377 U.S. 360, 375–78, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). The Court thus proceeds to the consideration of whether plaintiffs have made a showing sufficient to warrant injunctive relief.

[7] In the absence of the *Younger* limitations, the test for deciding whether injunctive relief is appropriate is the traditional one; plaintiffs must show that they will suffer irreparable harm and also that there is a substantial likelihood of success on the merits. *Doran v. Salem Inn, Inc., supra*, 422 U.S. at 931–932, 95 S.Ct. 2561. This Court must weigh the interests on both sides in this case, since an injunction still will operate to hamper the process of state law enforcement. *Id.*

[8] There is growing authority in this Circuit that the deprivation of first

amendment rights can constitute irreparable harm, at least where there is substantial evidence of "chilling effect." *414 Theater Corp. v. Murphy*, 499 F.2d 1155, 1160–61 (2d Cir. 1974); *Katz v. McAulay*, 438 F.2d 1058, 1060 n.3 (2d Cir. 1971), *cert. denied*, 405 U.S. 933, 92 S.Ct. 930, 30 L.Ed.2d 809 (1972). Indeed, in this case plaintiffs are faced with the alternative of foregoing exercise of their first amendment rights of both speech and assembly on the one hand or facing arrest on the other. This has been said to constitute irreparable injury. See *Dombrowski v. Pfister*, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22 (1965); *414 Theater Corp., supra*, 499 F.2d at 1160. Since plaintiffs need not be tested against the stricter *Younger* measurement of irreparable harm, the Court having concluded that *Younger* does not apply, the alleged deprivation of first amendment rights of political speech and assembly at the beginning of an election year is sufficient to show irreparable harm. On the other side, there has been no showing that the City will suffer any comparable harm.

[9] Plaintiffs also satisfy the second standard, likelihood of success on the merits. While this inquiry should not take this Court to the merits of the claim, it appears that the challenged ordinance offends two firmly established lines of Supreme Court precedent. First, the ordinance appears to constitute coercion to express, in this instance by actions, the acceptance of a symbol. This has been held to constitute a violation of first amendment rights. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 633–641, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). The doctrine of *Barnette* is still very much alive in the federal courts; it has been held recently that a schoolchild cannot be compelled to stand or leave the classroom during the pledge of allegiance. *Goetz v. Ansell*, 477 F.2d 636 (2d Cir. 1973).

"[T]here is no question but that the refusal to recite the pledge and salute the flag is a form of expression, and it matters not that the expression takes the form of silence . . . ." (*Russo v. Central School District*, 469 F.2d 623, 631 (2d Cir. 1972), *cert. denied*, 411 U.S. 932, 93 S.Ct. 1899, 36 L.Ed.2d 391 (1973).)

Plaintiffs' activities are similarly embraced within the protection of the first amendment, also because the right of assembly is involved.

In addition, the challenged ordinance appears unconstitutional in that it operates to place impermissible conditions upon the exercise of constitutional freedoms. See *Lamont v. Postmaster General*, 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed.2d 398 (1965); *DeJonge v. Oregon*, 299 U.S. 353, 57 S.Ct. 255, 81 L.Ed. 278 (1937); *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. 444, 80 L.Ed. 660 (1936).

It appears to this Court that the City of New York can no more require that plaintiffs display an American flag as a condition to public speech and assembly than it could require that every newspaper in New York City print an illustration of the American flag over its masthead as a condition to the exercise of freedom of the press.

Plaintiffs having shown that they will suffer irreparable harm in the event that preliminary relief is not granted and that there is a probability of success on the merits, it is hereby ordered that a preliminary injunction shall issue, restraining the defendants, their agents and employees from enforcing New York Administrative Code § 435–8.0 (a) and (c) against the named plaintiffs herein, pending the determination of the class action for declaratory relief, and the application for a permanent injunction.

Submit order.

CONFIRMATION HEARING ON:

RICHARD A. POSNER, JOHN H. MOORE II, JAMES C. CACHERIS, JESSIE E. ESCHBACH, CLYDE H. HAMILTON, AND DAVID V. O'BRIEN

FRIDAY, NOVEMBER 20, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 3:15 p.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Also present: Senator Heflin.

Staff present: Duke Short, chief investigator; and Pamela Swanner, clerk.

NOMINATION OF JESSE E. ESCHBACH, RICHARD A. POSNER, CLYDE H. HAMILTON, JOHN H. MOORE II, JAMES C. CACHERIS, AND DAVID V. O'BRIEN

The **CHAIRMAN**. The committee will come to order.

I am pleased to have today before the committee Judge Jesse E. Eschbach, of Indiana, who has been nominated for the position of circuit judge for the Seventh Circuit Court of Appeals; Richard A. Posner, of Illinois, to be circuit judge for the Seventh Circuit Court of Appeals; Clyde H. Hamilton, of South Carolina, to be U.S. district judge for the District of South Carolina; Judge John H. Moore II, of Florida, to be U.S. district judge for the Middle District of Florida; Judge James C. Cacheris, of Virginia, to be U.S. district judge for the Eastern District of Virginia; and David V. O'Brien, of the Virgin Islands, to be U.S. district judge for the District of the Virgin Islands.

I would like to see which Senators are present. We will take them first. I see Senator Percy is here.

Senator Percy, would you like to come around with the gentleman you are going to speak for and bring him to the table with you? If you would like to make your statement first, then I can ask you questions.

STATEMENT OF THE HON. CHARLES H. PERCY, A U.S. SENATOR, FROM THE STATE OF ILLINOIS

Senator **PERCY**. Thank you, Mr. Chairman.

The CHAIRMAN. I might do this before we start with these judges. They are going to be swearing people in. I am going to swear them now.

Would you please stand and raise your hand? Do you swear that the evidence you are about to give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. POSNER. I do.

Senator PERCY. I would be happy to testify under oath, Mr. Chairman, in this case.

I do appreciate very much having the opportunity to present to you Prof. Richard Posner for the hearing on his confirmation as judge of the Seventh Circuit Court of Appeals.

Judge Posner was originally brought to the attention of the President by an official of the Department of Justice and not myself. I am pleased, however, to be able to recommend him for confirmation.

Judge Posner has had a long and distinguished reputation as a student and teacher of the law. Having served myself for 30 years as a trustee of the University of Chicago, I immediately announced my great pride that the honor of a presidential nomination had come to a highly regarded member of our faculty.

We have another member of our faculty, Mr. Chairman, who is well known to you and the committee staff and other members of the committee, Edward Levi, who is at present at the University of Chicago. When I was a student at the university, he was the dean of the law school, and he subsequently became a U.S. Attorney General.

Ed Levi knows Mr. Posner well, and he strongly recommended Professor Posner to me as one who would distinguish himself in the Seventh Circuit Court of Appeals.

I would ask unanimous consent that his biography be incorporated in the record. I would only like to mention that he received his A.B. from Yale University, his LL.B. from Harvard University, magna cum laude, and was president of the Harvard Law Review. He served as a clerk to Mr. Justice William J. Brennan, U.S. Supreme Court. He served as assistant to the Solicitor General of the United States. He was editor of the Journal of Legal Studies and has written 10 or 12 major books that are looked upon as absolutely scholarly documents in the areas of his expertise.

He has written so many articles on so many subjects that he could be hanged for almost any of his views. They are controversial, without any question. But even those who might oppose those views look upon them as creative, imaginative, bold, and scholarly in every respect.

The power of his intellect is such that I know Attorney General Ed Levy, I, and others who know him feel that he would add great distinction to the Seventh Circuit Court of Appeals, which we like to feel is one of the finest circuit courts in the country.

I thank you, Mr. Chairman, very much indeed for your courtesy.

The CHAIRMAN. Senator, we are pleased to have you with us. Without objection, the document you want to put in the record will be incorporated at this point.

Senator PERCY. Thank you very much.

[Material referred to above follows:]

RICHARD A. POSNER

CURRICULUM VITAE

Education: A.B. Yale College, 1959, summa cum laude; LL.B., Harvard Law School, 1962, magna cum laude and Fay Diploma (first in class; President, Harvard Law Review).

Occupation: Law Clerk to Mr. Justice William J. Brennan, Jr., U.S. Supreme Court (1962-63); Assistant to Commissioner Philip Elman, Federal Trade Commission (1963-65); Assistant to the Solicitor General of the United States (1965-67); General Counsel, President's Task Force on Communications Policy (1967-68); Associate Professor of Law, Stanford Law School (1968-69); Professor of Law, University of Chicago Law School (1969-78); Lee and Brena Freeman Professor of Law, University of Chicago Law School (since 1978).

Other activities: Senior Research Associate, National Bureau of Economic Research (1971-76); Member, Senior Research Staff, National Bureau of Economic Research (1976-78); Research Associate, National Bureau of Economic Research (since 1978); Editor, Journal of Legal Studies (since 1972); Member, President's Task Force on Competition and Productivity (1969); American Bar Association's Commission to Study the FTC (1969); President, Lexecon Inc. (since 1977).

Professional memberships: American Bar Association, American Economic Association, American Law Institute.

The CHAIRMAN. Thank you very much for your appearance. I want to assure the judge here that the endorsement of the chairman of the Senate Foreign Relations Committee, Senator Percy, will insure his success.

Mr. POSNER. Thank you, Mr. Chairman.

The CHAIRMAN. Senator Percy, you are excused now. Mr. Posner, you may have a seat back there, while we hear from the Senators who are here. I believe Senator Hawkins is next and then Senator Chiles.

You are speaking on behalf of Judge John H. Moore II of Florida, to be a district judge for the Middle District of Florida, I believe. Is the Congressman from Florida here?

Mr. SHAW. Yes, sir.

The CHAIRMAN. Would you come forward and take a seat?

Judge Moore, would you stand and be sworn? Do you swear that the evidence you are about to give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge MOORE. I do.

The CHAIRMAN. We would be glad to hear from the two Senators now. Senator Hawkins, would you like to proceed?

STATEMENT OF HON. PAULA HAWKINS, A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator HAWKINS. Thank you. We appreciate this opportunity to be with you and to present the gentleman whose name we have placed in nomination for the Federal judgeship for the Middle District of our great State of Florida. This district begins in Jacksonville, it stretches down to Orlando, goes across to Tampa, and south to Fort Myers, and incorporates 33 counties.

For many years Judge Moore has been a pillar in our judiciary community. He is widely known for his astute, meticulous, and fair consideration of numerous landmark cases which have had and will have lasting effects upon the role of the court in today's complex society.

Judge Moore received his undergraduate education at Cornell University and Syracuse University and was awarded his doctorate of jurisprudence from the University of Florida. He served with distinction in the U.S. Navy, and he currently holds the rank of commander in the U.S. Naval Reserves.

From 1967 to 1977 Judge Moore served as circuit court judge of the seventh judicial circuit of Florida. Since August of 1977, Judge Moore has served on the Fourth District Court of Appeals, and in recognition of his outstanding judicial ability he currently serves as chairman of the Florida Judicial Qualifications Commission.

This man has unselfishly and with great accomplishment given his entire career to the noble cause of justice. His selection for the judgeship for the middle district of our State is certainly a great and deserved compliment to his lifelong endeavors.

It is indeed appropriate that this fine servant of the people and arbiter of justice be appointed to this high judicial position. Florida and America are very fortunate to have one of such unquestionable integrity to work with us for the betterment of our society.

Judge Moore's life has been exemplary. His nomination by your fine committee will surely strengthen our system of justice. I sincerely appreciate the expeditious handling of this judicial nomination by my good friend, the chairman of the Judiciary Committee and colleague, Senator Thurmond, and also the work of his able staff.

This judgeship has gone unfilled since its creation in October 1978, and court dockets have lengthened. We sincerely appreciate your helping us move this nomination in expeditious fashion.

It is a great honor to be here with my colleagues today to highly recommend for your consideration the Honorable John H. Moore II.

The CHAIRMAN. Thank you very much, Senator. We are glad to have you. You have a reputation around this Capitol of getting what you want, so I imagine you will be satisfied. [Laughter.]

We will now be pleased to hear from the able senior Senator from Florida.

STATEMENT OF HON. LAWTON M. CHILES, JR., A U.S. SENATOR FROM THE STATE OF FLORIDA

Senator CHILES. Thank you, Mr. Chairman. I am delighted to join with my colleagues in recommending Judge Moore. I think he will make a fine addition to the Federal court.

As Senator Hawkins has said, Judge Moore has served with great distinction, both as a circuit judge and on the appellate court in Florida. In addition to the legal work that he has done, he is an outstanding citizen of our State. He has served on our constitutional revision commission. He has been active in the Conference of Circuit Judges over the years. He has served with the American Bar Association's Judicial Administration Division, its National Conference on State Trial Judges, and the Committee on Courts and Community. We have mentioned his career in the Naval Reserve and the active duty he has served.

Judge Moore will certainly bring to the Federal bench a wide range of experience, both in the practice of law and on the courts, and I think he will make an outstanding addition to the Federal judiciary.

Senator Hawkins has mentioned the desperate need to fill this vacancy, and Judge Moore is going to have a great number of cases waiting for him when he takes the robes. So I am delighted to join with Congressman Shaw and my distinguished colleague in the Senate in recommending his appointment.

The **Chairman**. Senator, thank you very much for your presence here and your statement in behalf of the nominee.

We will now excuse the two Senators. I am sure they are busy with other matters. We thank them both for coming.

Congressman Shaw, if you would like to say a word in behalf of this nominee, we would be glad to hear from you.

STATEMENT OF THE HON. CLAY SHAW, A U.S. REPRESENTATIVE FROM THE STATE OF FLORIDA

Mr. **Shaw**. Thank you, Mr. Chairman.

My good friend Senator Hawkins on the way out just said that if anything happens it is on my neck now.

It certainly is a rare privilege for me to be able to come here and testify on behalf of somebody that I have known so long and so well. I have known Judge Moore since 1966, when I first moved to Fort Lauderdale, Fla., to join the law firm in which Judge Moore was a partner.

I have also had the privilege, as a lawyer in Broward County, Fla., to practice in front of him on many, many occasions. He was sitting on the circuit court bench in Broward County. We then lost Judge Moore to the appellate court as he moved up the line.

I might say at this point that in Florida we need the type of judge that Judge Moore has proven to be. He has a long record as a judge of unparalleled accomplishment. He has been a no-nonsense judge. He is certainly every bit the type of judge that we need in the State of Florida, and I could not recommend anybody to this position with any higher qualifications than Judge Moore.

Thank you.

The **Chairman**. Congressman Shaw, we thank you very much for your appearance here, and we appreciate your nomination on behalf of the nominee. You are now excused.

Mr. **Shaw**. Thank you, Mr. Chairman.

The **Chairman**. I believe we have Senator Warner here, speaking in behalf of Judge Cacheris.

Is Senator Byrd here?

Senator **Heflin**. I have a statement here from Senator Byrd.

Senator **Warner**. Mr. Chairman, Senator Byrd was not able to join us today, so he provided both Senator Heflin and me with copies of his statement.

The **Chairman**. **Judge** Cacheris, would you stand and be sworn? Do you swear that the evidence you are about to give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Cacheris**. I do.

The **Chairman**. Thank you. Have a seat.

Senator Warner, we are delighted to have you with us.

I want to say to Judge Cacheris that no State has two more able Senators than Virginia—Senator Warner and Senator Byrd.

We are very pleased to have you with us, Senator Warner.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Warner**. Thank you very much.

Mr. Chairman and Senator Heflin, I wonder if I might introduce Judge Cacheris's family? His wife Anne is with us, and three of his four children are also here. Would they stand, please? The fourth member of the family is en route from Virginia Polytechnic Institute home for the Thanksgiving holidays.

The **Chairman**. We are happy to have them here.

Senator **Warner**. Mr. Chairman, I am very pleased to introduce to the committee President Reagan's nominee to the Federal judgeship of the U.S. District Court for the Eastern District of Virginia, Judge James C. Cacheris.

Judge Cacheris is a resident of Annandale, Va. He is currently a trial judge on the busiest circuit court in the Commonwealth, the 19th Virginia Judicial Circuit Court. Judge Cacheris has served this court for over 10 years.

In 1960 he was an honors graduate at George Washington University Law School. He later served as an assistant corporation counsel in Washington, D.C., from 1960 to 1962. He is a former partner in the Alexandria, Va., law firm of Howard, Stevens, Lynch, Cacheris, and Cake. He was president of the Northern Virginia Trial Lawyers Association in 1969, vice president of the Alexandria Bar Association in 1971, and president-elect of the association when he became a judge.

Judge Cacheris was a member of the board of trustees of the Alexandria Legal Aid Society, a faculty member of the National Institute of Trial Advocacy, and a lecturer on sentencing for the 1979 Virginia orientation program for new judges.

Mr. Chairman and Senator Heflin, when I undertook the search for candidates for this judicial post, my single most important criterion was that a nominee must have demonstrated clearly during the course of his or her career the personal commitment to dispense equal justice for everyone under the law.

I determined that candidates for this nomination should have acquired a background which enables an understanding of life's broadest experiences with people, particularly those in lesser economic circumstances.

Finally, it was my position that the judicial robe, never an imperial robe, symbolizes the majesty of the law. Those who don it must always be conscious of the common everyday humanity and dignity which binds us equally together.

In my judgment, a judge's task demands persons of the highest order of intelligence, capable of interpreting the law, analyzing the issues, and making the findings of fact. It demands integrity unquestioned and honesty unsullied. It demands a very special individual. I believe, without equivocation, that we have before us today such an individual in Judge Cacheris. I urge this committee and my colleagues in the Senate as a whole to confirm this nomination.

He was unanimously endorsed by the Fairfax Bar Association. He received the top endorsement from the Arlington Bar Association, was unanimously endorsed by the Prince William Bar Association, and was the sole person endorsed by the Alexandria Bar Association. These are the bar associations most affected by the appointment of individuals to the post for which Judge Cacheris is being considered.

It is with a deep sense of pride that I present to the Judiciary Committee Judge James C. Cacheris, President Reagan's nominee for the U.S. District Court, Eastern District of Virginia.

Thank you.

The CHAIRMAN. Thank you very much, Senator. We are delighted to have you with us.

I had the pleasure of serving with Senator Warner on the Armed Services Committee. He is one of the ablest members on that committee.

Senator Byrd has sent a letter that I want to read for the record:

PREPARED STATEMENT OF SENATOR HARRY F. BYRD, JR.

Mr. Chairman and Gentlemen of the Judiciary Committee: I am pleased to commend for your consideration Judge James C. Cacheris for confirmation as a Federal District Judge.

Judge Cacheris has served 10 years as a Virginia State Circuit Judge. He has proved outstanding in his present position and has made for himself an enviable record as a member of the Virginia Judiciary.

I give my unqualified endorsement to Judge Cacheris. Indeed, I recommended his appointment to this position four years ago. I am pleased that President Reagan has nominated him for this very important position, and I hope that my colleagues on the Judiciary Committee will unanimously recommend his confirmation to the Senate of the United States.

Senator WARNER. Mr. Chairman, I invited Congressman Stan Parris to join us today, and I would hope that if he appeared the committee would afford him the opportunity to testify at a later time.

The CHAIRMAN. Senator, we would be glad to do that. I presume you are qualified to speak that he does endorse the nominee?

Senator WARNER. Unequivocally.

The CHAIRMAN. Thank you very much. Senator, you are now excused.

STATEMENT OF HON. STAN PARRIS, A U.S. REPRESENTATIVE FROM THE STATE OF VIRGINIA

Mr. PARRIS. Thank you, Senator.

I apologize for not being here when my name was called earlier. We had a recorded vote on the House floor on the Older Americans Act. As you know, under the relatively uncivilized rules of the House, at least as related to the Senate, we have to appear.

I have known Judge Cacheris for a number of years. He has served on the bench in the 19th judicial circuit, which is my home area, for over 10 years now. I have personally practiced in his court. I am familiar with him and the job he has done.

He has served with extreme distinction. He has been in our military. He is a reasonable man with commonsense. He has outstanding judicial temperament. He is probably the most even-handed judge I have appeared before as a practicing attorney in 20 years. I recommend him without hesitation or qualification to you and to the committee. I hope it will be your pleasure to confirm him.

The **Chairman.** Thank you very much, Congressman Parris, for testifying on behalf of Judge Cacheris. I am sure he appreciates it too.

Mr. **Parris.** Thank you, Mr. Chairman.

The **Chairman.** You are now excused.

Judge Cacheris, if you will sit back now, we will go ahead with the next one.

Senator Richard Lugar of Indiana and Senator Dan Quayle—are they here?

Senator **Quayle.** Yes, Mr. Chairman.

The **Chairman.** Would you bring your nominee forward, Judge Eschbach?

Senator Quayle, we are very pleased to have you with us.

I will ask the nominee to stand and be sworn. Do you swear that the evidence you are about to give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Eschbach.** I do.

The **Chairman.** Please have a seat.

Senator Quayle, we will be happy to hear from you. You may proceed.

STATEMENT OF HON. DAN QUAYLE, A U.S. SENATOR FROM THE STATE OF INDIANA

Senator **Quayle.** Thank you very much, Mr. Chairman.

Senator Lugar is unable to be here, but he does join with me in a very enthusiastic endorsement of a great man, Judge Jesse Eschbach. Not only has he been a great judge in the Northern District of Indiana, but Mr. Chairman you would also be interested to know that he has a great wife who has been a great partner with him for a number of years. They will make a fine addition to the Seventh Circuit Court in Illinois.

Mr. Chairman, Judge Eschbach has already enjoyed a long and varied legal career. After graduation from Indiana University Law School and 4 years of service in the U. S. Navy, Judge Eschbach worked first in private practice and then as a prosecuting attorney in Warsaw, Ind.

From 1962 until the present, he has served with great distinction as a U.S. district judge in the northern district of Indiana. During these past 20 years Judge Eschbach has consistently demonstrated his heartfelt commitment to the values of precedent, order, and predictability in the law.

As Donald Doxsee, the president of the Allen County Bar Association, which is the home county bar association for Judge Eschbach, has written:

> Judge Eschbach has earned the respect and the admiration of all of the lawyers in the District. While we regret losing him as a trial judge, we will have the satisfaction of knowing that he will be a fine addition to our Court of Appeals.

Mr. Chairman, to save time, I will just insert my remarks. Senator Lugar also has some remarks that he would like to have inserted in the record.

This is a fine man. As a matter of fact, as we sought not only a replacement for him but other appointments in the Northern District and in the State of Indiana—the word goes around on the nominating commission that Senator Lugar initiated and I joined with him—we always look for a Judge Eschbach type of judge to fill those vacancies. So you can see that his reputation is impeccable. Those in the judicial and the nonjudicial professions have a great deal of admiration for this man. It is with great enthusiasm that I and Senator Lugar endorse this candidacy.

Thank you, Mr. Chairman, for your expeditious hearing of this matter. The Seventh Circuit Court of Appeals will be better off because of it. Thank you very much.

The CHAIRMAN. I am sure the judge appreciates the high endorsement that the able Senator from Indiana has given today and also that of Senator Lugar who could not be here at this time, but his statement will be in the record.

[The prepared statements of Senator Quayle, with letter, and Senator Lugar follow:]

PREPARED STATEMENT OF SENATOR DAN QUAYLE

Mr. Chairman, I thank you for giving me the opportunity today to testify in support of Judge Jesse Eschbach's appointment to the Seventh Circuit Court of Appeals. I wish to reitirate my total confidence in Judge Eschbach and in his fitness to serve on the Seventh Circuit. As a resident of northeastern Indiana, I have come to know Judge Eschbach personally and have followed his judicial career very closely. Therefore, I feel that I can speak with some authority on the question of his nomination.

The Judge's character, legal scholarship and professional experience are unassailable. Senator Lugar and I are joined by Governor Robert Orr of Indiana in urging his appointment. Judge Eschbach also has the wholehearted endorsement of both the Allen County Bar Association and the Indiana State Bar Association.

Judge Eschbach has already enjoyed a long and varied legal career. After graduation from the Indiana University Law School and four years of service in the United States Navy. Judge Eschbach worked, first, in private practice and, then, as a prosecuting attorney in Warsaw, Indiana. From 1962 until the present, he has served with distinction as United States District Judge of the Northern District of Indiana.

During these past twenty years, Judge Eschbach has consistently demonstrated his heartfelt commitment to the values of precedent, order and predictability in the law. As Donald Doxsee, the president of the Allen County Bar Association has written, "Judge Eschbach has earned the respect and admiration of all of the lawyers in the District. While we regret losing him as a trial judge, we will have the satisfaction of knowing that he will be a fine addition to our Court of Appeals."

Mr. Chairman, I do not think it too much to say that Judge Eschbach has become Indiana's most well-respected jurist - one who has truly earned his reputation as a man of the highest integrity, common sense and fairness.

Further, the Judge's career exhibits his compatability with the philosophy and ideals of the present Administration. His record bears out his widespread reputation as a stern enforcer of the criminal laws. His attitude toward sentencing, for example, reflects his appreciation both for the difficulties of law enforcement, and for the exigencies of real-life circumstances. In particular, I would direct your attention to the length of the prison sentences the Judge handed out in a series of drug-related cases during the last decade, sentences credited with a major impact on the level of drug trafficking in Northern Indiana.

Mr. Chairman, to sum up, Judge Jesse Eschbach is an example of tremendous commitment and achievement to everyone who works in the field of law and strives for excellence. I am certain that this performance as United States Circuit Judge for the Seventh Circuit will bring honor to Indiana and to the entire nation. I urge the Committee to act expeditiously in recommending his confirmation.

Thank you.

The Allen County Indiana Bar Association, Inc.
1904 Fort Wayne National Bank Building
Fort Wayne, Indiana 46802
Phone 423-2358

November 2, 1981

The Honorable Strom Thurmond
Chairman of the Judiciary Committee
United States Senate
Washington, D.C. 20510

Re: The Honorable Jesse E. Eschbach
Candidate for U.S. Court of Appeals
Seventh Circuit

Dear Senator Thurmond:

I am writing as President of the Allen County Bar Association which consists of approximately 500 lawyers and is the second largest county Bar Association in the State of Indiana. I am writing on behalf of the Association to endorse the nomination of the Honorable Jesse E. Eschbach as Judge of the Seventh United States Court of Appeals. Judge Eschbach has served long and well as a United States District Court Judge in the Northern District of Indiana and has earned the respect and admiration of all of the lawyers in the District.

Judge Eschbach has earned the reputation of not only being a fair and hard working judge, but also a very learned judge. I am sure that he will do an outstanding job on the Court of Appeals. While we will regret losing him as a trial judge, we will have the satisfaction of knowing that he will be a fine addition to our Court of Appeals.

We urge your Committee to approve Judge Eschbach's nomination and hope that the Senate will confirm that nomination.

Very truly yours,

Donald D. Doxsee
President

DDD/rs

United States Senate
WASHINGTON, D.C. 20510

STATEMENT BY SENATOR DICK LUGAR
ON THE NOMINATION OF JUDGE JESSE E. ESCHBACH TO THE
U.S. COURT OF APPEALS FOR THE 7TH CIRCUIT 11/20/81

Mr. Chairman:

It is my pleasure today to introduce to this committee Judge Jesse E. Eschbach, who has been nominated by the President to serve on the United States Court of Appeals for the 7th Circuit.

Judge Eschbach is currently the Chief Judge of the United States District Court for the Northern District of Indiana. He was appointed to the federal bench in 1961 by President Kennedy.

Judge Eschbach is a legal thinker of genuine distinction. His credentials are unsurpassed. He has earned the respect and admiration of the legal community and the general public during a lifetime of public service. His two decades on the federal bench have created a record of great jurisprudential distinction and sound legal philosophy. The American Bar Association gave Judge Eschbach a rating of exceptionally well qualified for his appointment to the appeals court, the ABA's highest rating, which is rarely given.

In his years on the bench, Judge Eschbach has taken seriously his public trust in our judicial system. In one of his rare public statements outside the courtroom once, Judge Eschbach described the life of a judge as a lonely one. He said of the judiciary:

"We are the only institution which has no army, secret service or anything else to support our opinions. Judges are supported by the public which chooses to adhear to the law.

"If the public loses confidence in our judicial system and particularly the integrity and impartiality of the judges, then our democratic system will collapse. So it's not just a matter that a judge knows he is not influenced in a particular case, but that the lawyers, litigants, and especially the public knows he isn't.

"The only way a judge can do that is not by creating false images, but by setting a code he lives by. It's a matter of conscience. A judge, like Caesar's wife, must be beyond suspicion."

Judge Eschbach, in his years on the bench and in public life, has lived by that code of ethics. He will continue to be on the appeals court a great asset to our judiciary and our democratic form of government. Thankyou Mr. Chairman.

Dick Lugar

The **Chairman**. Thank you very much, Senator. You are now excused.

Senator Hollings, do you want to come forward with Mr. Hamilton, Congressman Campbell, and Congressman Napier.

Mr. Hamilton, would you raise your right hand? Do you swear that the evidence you are about to give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **Hamilton**. I do.

Senator **Heflin** [acting chairman]. Senator Hollings, we are delighted to have you with us. Senator Thurmond wants to come down to the witness table. It is the first time I have had the chairman down there as a witness before me. Maybe I will cross-examine the chairman from here.

STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA, AND CHAIRMAN, COMMITTEE ON THE JUDICIARY

The **Chairman**. Mr. Chairman, I am very pleased to introduce to the Judiciary Committee, Mr. Clyde Hamilton, nominee for the position of U.S. district judge for the District of South Carolina. I have known Clyde Hamilton for many years, and I have no hesitation in attesting to his credentials.

Mr. Hamilton, a native of Edgefield, S.C., obtained his undergraduate degree from Wofford College in 1956. After graduation, he entered the U.S. Army and obtained the rank of first lieutenant prior to his discharge in 1958. He then attended George Washington University Law School, where he served as a member of the Law Review editorial staff prior to obtaining his J.D. degree in 1961.

Incidentally, I might mention that he worked part time in the Senate Library and worked his way through law school in that way.

From 1963 to the present, Mr. Hamilton has served with distinction with one of South Carolina's most prestigious law firms, Butler, Means, Evins, & Browne of Spartanburg, S.C.

Mr. Hamilton is a member of the American Bar, South Carolina, and Spartanburg County Bar Associations. He is a past member of the American Judicature Society as well as the South Carolina Bar Association's Judicial Reform Committee. He recently was appointed to membership on the South Carolina Supreme Court Board of Commissioners on Grievances and Discipline.

I will not attempt to name all of the awards Mr. Hamilton has received nor the many organizations he has served. Suffice it to say, I consider Clyde Hamilton to be an outstanding citizen and a fine American. He is widely respected in his community as a man of unquestionable integrity and ability. I am confident he will distinguish himself as a Federal judge and bring great credit to the State of South Carolina.

It was my privilege to recommend Mr. Hamilton to the President for this position, and I wholeheartedly support his nomination. I am very pleased that my able colleague, Senator Hollings, is here to testify in his behalf also as well as two able Congressmen from our State.

I might say that Mr. Campbell also recommended Mr. Hamilton. He is from his congressional district. I am sure that his recommendation carried great influence with the President.

Mr. Napier?

Senator HOLLINGS. He had to leave.

The CHAIRMAN. He had to leave. He may wish to put a statement in the record. If he does, we will keep it open for that purpose. He is the Congressman from the district from whence his mother came when she went to another district to marry Mr. Hamilton's father.

It is a great pleasure for me to endorse him wholeheartedly, and I am sure he will make an outstanding judge of whom we will all be proud.

[A letter from Congressman Napier follows:]

CONGRESS OF THE UNITED STATES,
HOUSE OF REPRESENTATIVES,
Washington, D.C. November 21, 1981.

Senator STORM THURMOND,
Chairman, Judiciary Committee,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I regret that I was called away yesterday while awaiting to testify in behalf of the Honorable Clyde Hamilton for his judgeship confirmation and was unable to return to speak on his behalf.

Although Mr. Hamilton is not a native of the Sixth Congressional District, I had wanted to testify for two reasons. First, his mother was from Marlboro County, and his maternal ancestry includes some of the most distinguished families who have rendered public service there. Mr. Hamilton comes from a long tradition of public spirited forebearers, particularly the Odom and Newton families. As such, we in the Sixth Congressional District take great pride in his nomination for a judgeship. Second, as a member of the South Carolina Bar, I want to attest to the reputation he bears. The name Clyde Hamilton, among members of the Bar in South Carolina, is a name which means honor, integrity, fairness, and legal excellence. He will serve well, and will bring great credit to the bench.

If possible, I would appreciate your making this letter part of the hearing record, and again, I regret I had to leave just prior to testifying.

Yours very truly,

JOHN L. NAPIER,
Member of Congress.

STATEMENT OF HON. ERNEST F. HOLLINGS, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator HOLLINGS. Mr. Chairman, I think the record should show that my distinguished senior Senator and the chairman of your august committee was last seen in my bed at 5:15 this morning. [Laughter.]

The record would be, Mr. Chairman, that with the Senate voting all night long, only a few sofas were available in the hall, but not enough sofas for the number of Senators. So the game was to get up and vote quick and get your sofa back, and I was not quick enough. At 5:15 the distinguished chairman of this committee was there when I got back—resting on my sofa.

The CHAIRMAN. Mr. Chairman, may I say that I did not realize that he was occupying that sofa, or I would have sought another one.

Senator HEFLIN. I suspect that he had one of his aides discuss with me, because I had my eye on that sofa. [Laughter.]

Senator HOLLINGS. Mr. Chairman, in all seriousness, our senior Senator has recommended an outstanding member of our bar. We are blessed in South Carolina with an outstanding Federal bench and Clyde Hamilton follows along in that same vein. As a graduate of George Washington University Law School, he served on the "Law Review" there. He was a member of its board of editors.

He is a member of the outstanding Spartanburg firm of Butler, Means, Evins & Browne. He is widely respected for his integrity, his fairness, and his keen legal mind, and his just downright basic good judgment.

I think one of his outstanding qualities is his civic nature and his attendance to civil consciousness and duties. As a member of the bar, he is on our Supreme Court Board of Commissioners on Grievances and Discipline. In the community he has served as president of the Spartanburg County Arts Council. He is trustee at the Spartanburg Day School and Spartanburg Methodist College.

In every regard he has participated, and over a 20-year period at the bar continued on with the industry, as Senator Thurmond has emphasized here, as an assistant to him and his staff in the U.S. Senate and working with the Senate Library. He has been diligent and a hard worker.

These traits of character, intelligence, professional capacity, community involvement, and leadership, in my judgment, make him more than well qualified for the position.

I would ask unanimous consent that my full statement be included in the record.

Senator HEFLIN. Without objection, it is so ordered.

[The prepared statement of Senator Hollings follows:]

STATEMENT OF SENATOR ERNEST F. HOLLINGS

Mr. Chairman and members of the committee, it is a pleasure that I, along with the chairman, appear here today to introduce a distinguished attorney and citizen of South Carolina, Clyde H. Hamilton. He has been nominated by President Reagan to be United States District Court Judge for South Carolina. He has been selected to fill the vacancy that occurs with the elevation of the Honorable Robert F. Chapman to Circuit Court Judge for the United States Court of Appeals for the Fourth Circuit.

We in South Carolina are very pleased with this prospective addition to our Federal bench. In the past few years the South Carolina District has been expanded from five judges to eight, and, with retirements and elevations, there have necessarily been several appointments. This newest appointment, Mr. Chairman, follows in the high tradition of excellence our Federal Judiciary exemplifies and to which we in South Carolina have become routinely accustomed. I am confident that Clyde Hamilton will similarly distinguish himself.

I know the Chairman will have detailed comments to make about Clyde's record so I will try not to be lengthy in my remarks. However, let me take a few minutes to highlight some of his achievements so you can get the full flavor of the credentials Clyde Hamilton brings to this important, life-time appointment.

Clyde H. Hamilton was born in Edgefield, South Carolina on February 8, 1934, to Clyde H. and Edwina Odom Hamilton. He is a product of the Edgefield Public Schools and graduated from high school in 1952. He received his B. S. degree from Wofford College, Spartanburg, South Carolina, in 1956, and in 1961, he received his Juris Doctor degree, with honors, from The George Washington University School of Law where he also was a member of the Board of Editors of the Law Review.

From 1956 to 1958, he served in the United States Army. He began his tour of duty as a Second Lieutenant and resigned his commission in 1962 as a Captain in the U.S. Army Reserves.

Upon graduation from law school and being admitted to the South Carolina Bar in 1961, Clyde returned to his hometown and began to practice law with J. R. Folk, Esquire. In 1963, he moved to Spartanburg and joined the law firm of Butler, Means, Evins and Browne. He is presently a partner in that firm. Over this twenty or so year career, he has practiced law with distinction. He commands the admiration of his colleagues and the confidence of his clients. He is widely respected for his integrity, fairness, keen legal mind and wise counsel. Those of us who know him are confident that his abilities will quickly become evident to those citizens and attorneys who will appear before his court.

The record of Clyde's professional, church and community involvement reflects the confidence and trust others place in him. I will not cite all his many activities here, but, instead will just list a representative few. He has served as a member of the South Carolina Supreme Court Board of Commissioners on Grievances and Discipline, is a member of the American and South Carolina Bar Associations and is listed in Who's Who in American Law. He is very active in the Trinity United Methodist Church and has served as past Chairman of the Finance Committee and Administration Board and currently serves as a Trustee. He has served as President of the Spartanburg County Arts Council. And, he currently serves as trustee on two school boards: Spartanburg Day School and Spartanburg Methodist College. Clyde's involvement in these many activities underlines his strong commitment to his profession and community and his willingness to accept responsibility and participate. He is married to the former Mary Elizabeth Spillers. They are the parents of two sons.

Mr. Chairman and members of the committee, let me close my remarks by saying that Clyde Hamilton has demonstrated those traits of character, intelligence, professional capacity and community involvement and leadership that make him very well qualified for this important position. I am pleased to recommend him and do so with confidence that he will serve very capably as District Judge.

Mr. Chairman, I ask that a brief biography be included with my remarks.[1] And, if there are questions from you or members of the committee, Mr. Chairman, I will be pleased to try and respond.

Senator HEFLIN. Congressman Campbell, we are delighted to have you. Please proceed.

STATEMENT OF HON. CARROLL CAMPBELL, A U.S. REPRESENTATIVE FROM THE STATE OF SOUTH CAROLINA

Mr. CAMPBELL. Thank you, Mr. Chairman.

I am pleased to come before this committee today in behalf of Clyde Hamilton, a man who is eminently qualified to serve as U.S. district judge for South Carolina.

Having known Clyde Hamilton for some time, I can personally attest to his intelligence, his honesty, and his superior legal acumen. He has practiced law, as Senator Thurmond said, in Spartanburg since the early 1960's with one of the most prestigious law firms there.

In his practice, he has earned a reputation for fairness, for hard work, and for compassion, the qualifications that I know this committee looks for in a nominee to the Federal judiciary.

If, in the words of Oliver Wendell Holmes, the life of the law is experience, then Clyde Hamilton possesses all those qualifications, qualifications of experience alluded to by distinguished Senator Hollings from South Carolina. That experience has been gained from his activities in the community, his participation in civic affairs and the maturity that he gained.

I might also add that Clyde Hamilton's training under the distinguished chairman of this committee did not hurt him as he came through life.

In conclusion, I have complete confidence that Clyde Hamilton will make an outstanding Federal judge, a judge who will perform his duties with diligence and a proper respect for the high standards of judicial restraint. I urge the committee to unanimously approve the nomination of Clyde H. Hamilton to be a Federal district judge for South Carolina.

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[1] Mr. Hamilton's biography appears at the end of this hearing.

Senator HEFLIN. Thank you, gentlemen. The chairman will now return to the podium and chair the remainder of the hearing.

The CHAIRMAN. Next we have David V. O'Brien of the Virgin Islands. I believe the Delegate to the Virgin Islands is here, Ron deLugo. Is that correct?

Mr. DELUGO. That is correct, Mr. Chairman.

The CHAIRMAN. Mr. O'Brien, would you stand and be sworn? Do you swear that the evidence you are about to give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. O'BRIEN. I do.

The CHAIRMAN. We are very pleased to have you with us, Mr. deLugo. You may proceed.

STATEMENT OF HON. RON deLUGO, DELEGATE, U.S. VIRGIN ISLANDS

Mr. DELUGO. Thank you, Mr. Chairman. I thank you for the courtesy extended here and the opportunity to introduce the President's nominee.

It is my pleasure to introduce Mr. David O'Brien to this committee for confirmation as the President's nominee for the position of judge for the U.S. District Court of the Virgin Islands.

With the chairman's permission, I would also like to introduce Mrs. O'Brien—Jan O'Brien—who has accompanied Dave here today.

The CHAIRMAN. We are going to introduce all the family members in a few minutes when we start the testimony; but go ahead, that is all right.

Mr. DELUGO. Thank you very much, Mr. Chairman.

I have known Dave since he moved to the Virgin Islands back in 1970. For almost 11 years now David O'Brien has practiced law in the U.S. Virgin Islands. He is presently one of the most active trial lawyers in the Territory.

In addition to his practice, Mr. O'Brien has been a member of the Virgin Islands Bar Association board of governors, chairman of the Virgin Islands Bar Association judiciary committee, a member of its ethics committee, and is currently the Virgin Islands delegate to the lawyers advisory committee to the third circuit. His service to and participation in the community are beyond question.

It is for these reasons, and because I think that Dave O'Brien is a fine person who will preside over the district court with fairness and a strong sense of duty, that I urge this committee to confirm his nomination as judge for the U.S. District Court for the Virgin Islands.

The CHAIRMAN. Thank you very much.

Mr. O'Brien, you come highly recommended by the able and distinguished Delegate from the Virgin Islands, Mr. DeLugo. We will come back to you in a few minutes.

Mr. O'BRIEN. Thank you.

Mr. DELUGO. Thank you, Mr. Chairman.

The CHAIRMAN. We will now take the circuit judges first. Judge Eschbach, would you come forward and have a seat?

TESTIMONY OF JUDGE JESSE E. ESCHBACH, NOMINEE, CIRCUIT JUDGE, SEVENTH CIRCUIT COURT OF APPEALS

Judge ESCHBACH. Thank you, Mr. Chairman.

The CHAIRMAN. Judge, before we start, do you have any members of your family here you would like to introduce? If so, have them stand up.

Judge ESCHBACH. Yes, Mr. Chairman—my wife, Mrs. Eschbach.

The CHAIRMAN. I swore you a few minutes ago, did I not?

Judge ESCHBACH. Yes, Mr. Chairman, you did.

The CHAIRMAN. Judge, I believe you have two children.

Judge ESCHBACH. Yes, sir.

The CHAIRMAN. You obtained your B.S. degree from Indiana University and your J.D. degree from Indiana University Law School. Is that correct?

Judge ESCHBACH. Yes, sir.

The CHAIRMAN. You served in the Navy for 3 years. That was during World War II?

Judge ESCHBACH. Yes, sir.

The CHAIRMAN. You were a member of the firm of Graham & Eschbach.

Judge ESCHBACH. Yes, sir.

The CHAIRMAN. How long have you been a district court judge?

Judge ESCHBACH. Just less than 20 years, Mr. Chairman.

The CHAIRMAN. Prior to that, I believe you served as a deputy prosecuting attorney and a city attorney and held various other positions in your State.

Judge ESCHBACH. Yes, sir.

The CHAIRMAN. In 1975 you opposed a moratorium on adult book stores in Indiana stating that the moratorium suppresses first amendment rights. What are your views on the laws relating to pornography, and how do you feel the problem can effectively be dealt with without violating first amendment rights?

I am very interested in seeing that pornography is not distributed over this country and made available to the young people especially. I think some people go too far in claiming first amendment rights. I would like to hear your views on that.

Judge ESCHBACH. I would agree with you, Mr. Chairman. There are absurd positions voiced in regard to first amendment rights. The unfortunate aspects of the statutes which you have in mind and ordinances in the State of Indiana were written so broadly, Mr. Chairman, that they were applied to perfectly acceptable comic books for youngsters. They endeavored to reach massage parlors so broadly that physical therapists in a clinic would have been prohibited from exercising those skills.

I agree with you, sir, that pornography can and should be controlled, but I think it has to be done with definitions so that citizens know precisely what the bounds of acceptable conduct are.

The CHAIRMAN. Judge, I believe you oppose the television coverage of court cases. Would you care to discuss your reasoning behind this?

Judge ESCHBACH. Yes; my reasoning applies principally, Mr. Chairman, to jury trials. It has been my experience in trying a number of rather controversial, celebrated trials that when there is wide media coverage, sketch artists, and the networks, it is distracting to the jurors.

While we do and should permit that, I have been of the view, Mr. Chairman, that television cameras in the courtroom would be so distracting to jurors that they could not keep their attention centered on the evidence and the witnesses being presented.

The CHAIRMAN. Judge Eschbach, you have stated that there is a definite problem of rehabilitating prisoners in Indiana. What suggestions do you have to improve prisoner rehabilitation?

Judge ESCHBACH. First, Mr. Chairman, I think prisoner rehabilitation, at least on the State level, is and should be principally a local problem dealt with by the various States. I think my comments were in the context of recommendations as to additional facilities and support personnel that might be utilized to train persons. I think we see more of that on the Federal level. I think some States are implementing it, but I think it is principally a State problem, sir, that should be dealt with by State legislation.

The CHAIRMAN. Judge, some people feel that the judges in the last 30 years have been using their powers to practice judicial activism. How do you feel about this? In other words, do you believe the Constitution says what it means and means what it says, or do you feel that a judge ought to have the power to put into play his own opinions and the reforms that he thinks ought to be made? Do you think the Congress ought to make the policy and the judges interpret the law?

Judge ESCHBACH. Yes, sir.

The CHAIRMAN. I would like to hear you elaborate a little more on that point.

Judge ESCHBACH. I think, Mr. Chairman, that judges above all others have to be very cautious that they do not find themselves executing and/or implementing their own social concerns, their own social views, because in the last analysis, if I may use the term, the judiciary is, in a way, a referee of a violation of the separation of powers. When the judiciary is itself guilty of that, it is even a greater sin, if I may use that term, than perhaps when the legislative branch or the executive branch does so. I think that those who set the policy should be those elected by the people.

The CHAIRMAN. If a jury found a man guilty or if you found him guilty and it was felt he deserved the death penalty, would there be any hesitation on your part to impose the death penalty?

Judge ESCHBACH. No, sir, not if the law and the facts justified it.

The CHAIRMAN. Is there anything else you would like to say to us?

Judge ESCHBACH. No, sir.

The CHAIRMAN. Thank you very much. You might have a seat now.

Judge ESCHBACH. Thank you, Mr. Chairman, for your time and consideration.

The CHAIRMAN. We can excuse you now, if you wish—you and your family.

Judge ESCHBACH. Thank you.

The CHAIRMAN. Our next nominee is Richard A. Posner of Illinois.

Mr. Posner, would you come around? You have already been sworn.

TESTIMONY OF RICHARD A. POSNER, NOMINEE, CIRCUIT JUDGE, SEVENTH CIRCUIT COURT OF APPEALS

Mr. POSNER. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. Posner, do you have any members of your family here you would like to introduce?

Mr. POSNER. No, I am afraid they were not able to come with me.

The CHAIRMAN. I believe you have two children, Mr. Posner.

Mr. POSNER. I do.

The CHAIRMAN. You finished Yale College with an A.B. degree and Harvard Law School with an LL.B. degree. Is that correct?

Mr. POSNER. Yes.

The CHAIRMAN. Did you serve as a clerk to Justice Brennan?

Mr. POSNER. Yes, I clerked for Justice Brennan.

The CHAIRMAN. Did you write his liberal decisions? [Laughter.]

Mr. POSNER. I assisted Justice Brennan to the best of my ability.

The CHAIRMAN. I believe you served with the Federal Trade Commission as a legal assistant.

Mr. POSNER. Yes.

The CHAIRMAN. You served with the Department of Justice in the Solicitor General's Office.

Mr. POSNER. That is correct.

The CHAIRMAN. I notice that you served on the President's Task Force on Communications Policy as general counsel.

Did you teach at Stanford Law School?

Mr. POSNER. Yes, I did.

The CHAIRMAN. How long did you teach there?

Mr. POSNER. Just a year.

The CHAIRMAN. Did you leave of your own accord?

Mr. POSNER. Yes, I did.

The CHAIRMAN. You have taught at the University of Chicago Law School from 1969 to the present.

Mr. POSNER. That is correct.

The CHAIRMAN. You are still a teacher there?

Mr. POSNER. Yes.

The CHAIRMAN. Mr. Posner, you have a great deal of experience in the field of antitrust and industrial regulatory problems, I understand.

Mr. POSNER. Yes.

The CHAIRMAN. You coauthored several books on these subjects which are widely read by many attorneys who specialize in these areas. However, you lack extensive trial experience, which many feel is necessary to successfully fulfill the duties of either a district court or circuit court judge. Do you feel that this lack of trial experience will hinder your effectiveness as a judge?

Mr. POSNER. I do not think so, Mr. Chairman. Although I have not actually conducted trials, during the last 10 years as a consultant in major antitrust litigation I have participated in some of the largest antitrust cases in the land. When I worked for the Solicitor

General and after I left the Government, I briefed and argued a number of cases in the Supreme Court and the Federal courts of appeals, and I regard that as highly relevant background for a circuit judge.

The CHAIRMAN. Mr. Posner, many people feel that academicians have a tendency to be doctrinaire in their approach to the law. Do you feel you have the necessary sensitivity to effectively deal with cases on an individual basis and yet retain your objectivity?

Mr. POSNER. Yes, I think so, Mr. Chairman. I regard becoming a judge as a distinct career change, because the role of a judge is very different from that of a law professor. The responsibility of a judge is to carry out the will of others—of the legislature—rather than to push his own academic ideas.

The CHAIRMAN. Mr. Posner, if a decision in a particular case was required by case law or statute as interpreted according to your perception of legislative intent and yet offended your own conscience, what might you do in this situation?

Mr. POSNER. If the statute was constitutional, I would feel duty bound to enforce it in accordance with the legislative intent and not substitute my personal views of what is right or just.

The CHAIRMAN. You would be willing to subjugate your personal views to the statute or the law?

Mr. POSNER. Yes, I think that kind of subjugation is the judge's duty.

The CHAIRMAN. Do you believe changes in the law should be reserved to a legislative body whose members can be altered by the voters if an elected official fails to reflect the values of society?

Mr. POSNER. Yes, I think the only power to amend or repeal legislation, if it is constitutional legislation, is the legislature's. The fact that a judge disagrees with a law or would not have voted for it if he had been a legislator is not a valid ground for refusing to enforce the law.

The CHAIRMAN. Do you feel that Congress should make policy and that the courts should interpret the law that the Congress makes?

Mr. POSNER. Absolutely.

The CHAIRMAN. There is no question in your mind about that?

Mr. POSNER. No.

The CHAIRMAN. Do you believe the Constitution says what it means and means what it says?

Mr. POSNER. Unfortunately, the Constitution is not always clear; but I think the judge's duty is to try to enforce the Constitution according to the intent with which it was drafted rather than according to his own personal views of what is right.

The CHAIRMAN. Do you feel confident in your own capacity at this point in your career to carry out the very significant power and responsibility of being a circuit court judge, which is the next highest court to the Supreme Court?

Mr. POSNER. Yes, I think I have acquired the emotional maturity and intellectual self-discipline to carry out, as you say, these very grave responsibilities.

The CHAIRMAN. Is there anything else you would like to say to us?

Mr. **Posner**. I would like to thank you for your courtesy and thank Senator Percy for his support and the President for having nominated me.

The **Chairman**. Thank you very much. You are now excused.

Mr. **Posner**. Thank you.

The **Chairman**. Now we will take the first of the district court judge nominees, Mr. Clyde H. Hamilton.

Mr. Hamilton, would you come forward?

TESTIMONY OF CLYDE H. HAMILTON, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF SOUTH CAROLINA

Mr. **Hamilton**. Thank you, Mr. Chairman.

The **Chairman**. Would you care to introduce your family who is here with you at this time?

Mr. **Hamilton**. Yes, Mr. Chairman. I have my wife Mary Lib, our oldest son John, and my youngest son Bill here.

The **Chairman**. We are very pleased to have them here. I know they are proud of you, having been appointed to this high position. Please have a seat.

Mr. **Hamilton**. Thank you, Mr. Chairman.

The **Chairman**. Mr. Hamilton, I believe you were born in Edgefield.

Mr. **Hamilton**. Yes, sir.

The **Chairman**. You are the son of Clyde H. Hamilton and Edwina Odom Hamilton.

Mr. **Hamilton**. Yes, sir.

The **Chairman**. Incidentally, I knew your mother and father when they were courting. She was a student at Sander College, and he lived in my hometown, my original hometown.

Mr. **Hamilton**. I have heard some of the stories.

The **Chairman**. We did a little courting together.

I believe you finished Wofford College in 1956 and George Washington University Law School with a J.D. degree in 1961.

Mr. **Hamilton**. Yes, sir.

The **Chairman**. I understand you graduated with honors.

Mr. **Hamilton**. Yes, sir, I did.

The **Chairman**. You have practiced in Spartanburg with Butler, Means, Evins & Browne since 1963, I believe. Are you still a member of that firm?

Mr. **Hamilton**. Yes, sir, I am.

The **Chairman**. Have you specialized in any particular branch of the law, or does your firm do a general law practice?

Mr. **Hamilton**. Our firm does a general practice. In more recent years I have specialized in the corporate areas.

The **Chairman**. Mr. Hamilton, do you think your relative lack of trial experience will hinder your ability to take full control of the vigorous demands placed upon a trial judge?

Mr. **Hamilton**. No, sir, I do not. While it is true that my practice in recent years has not involved the trial of a large number of cases, my experience with litigated matters has been very broad, ranging from bankruptcy matters, tort litigation, Fair Labor Standards Act cases, defamation of character cases, securities litigation, and here in Washington a proceeding before the Judicial Panel on Multidistrict Litigation.

As a result of this broad experience, I have obtained a full, complete, and competent working knowledge of courtroom procedures and proceedings. I am confident of my ability to assume and discharge the responsibilities of a U.S. district judge.

The CHAIRMAN. Mr. Hamilton, would you give us your views as to the constitutional issues raised under the case or controversy theory?

Mr. HAMILTON. Mr. Chairman, as to the constitutional issues raised under the case or controversy theory, the Federal courts should go no further in deciding such issues than the claims of the case or controversy require. The decision should be confined to the issues of the case or controversy susceptible of judicial determination as presented by adversaries with a personal and direct connection and stake in the outcome of the controversy.

I do not think that Federal courts should decide causes as opposed to issues. I think the decision should be limited to the issues and that the opportunity should not be taken for the expression of personal views or concerns which are not directly an issue of the case or controversy.

The CHAIRMAN. Mr. Hamilton, do you believe that litigants in State court receive the same level of fairness, due process, and quality of justice as do litigants in Federal court?

Mr. HAMILTON. Basically it has been my observation that the litigants in State courts do receive the same degree of fairness, due process, and quality of justice. I would have to observe, however, that I do consider the Federal courts to be a better forum, primarily because the Federal judges seem to have somewhat better credentials due to their background, training, and their broader experience.

I might add that when I was a member of the judicial reform committee of the State Bar Association we implemented certain procedures designed to strengthen the State judiciary, such as merit selection panels. In conjunction with the Supreme Court, we implemented the continuing legal education requirements for State judges.

The CHAIRMAN. Mr. Hamilton, what are your views on the laws relating to child pornography? Should they be more vigorously enforced, or is this an area where sufficient action is presently being taken?

Mr. HAMILTON. Mr. Chairman, one can hardly pick up any newspaper across the breadth of this country today without reading of the sexual exploitation of young people, sometimes children of very tender years, for profit. It would seem to me that all law enforcement agencies should work in conjunction, including perhaps the postal inspectors, for the vigorous enforcement of these laws.

As has been alluded to here earlier, the first amendment rights, in my opinion, must be balanced with the rights of society to protect itself and particularly to protect itself from a flood of pornographic materials in the marketplace.

The CHAIRMAN. Mr. Hamilton, do you believe that Congress should make the law and that courts should interpret the law, or do you feel that judges should practice judicial activism and implement their own views as to what they feel is just and right?

Mr. HAMILTON. Mr. Chairman, I concur wholeheartedly with the statement which was attributed to Justice O'Connor, that the proper role of the Federal judiciary is to interpret and apply the law and not make the law. I assure you that within my court there will be no judicial activism.

The CHAIRMAN. Mr. Hamilton, do you have any other statements you wish to make to the committee?

Mr. HAMILTON. Mr. Chairman, as a matter of personal privilege I would just like to put in the record that I am somewhat in a unique position and honored to be following four other judges who have been associated with my law firm, going back as far as the Honorable James F. Byrnes, who perhaps served this country in more positions than any other man in modern history, among such positions as a Justice of the Supreme Court.

Then there was Federal Judge Cecil Wyche; more recently the Honorable Donald S. Russell, who served as district judge, president of the University of South Carolina, Governor of the State, U.S. Senator, and now serves on the Fourth Circuit Court of Appeals; and, more recently, the Honorable Robert F. Chapman, who served as U.S. district judge and currently serves on the Fourth Circuit Court of Appeals. Thanks to him, the seat is open for which I am appearing before you here today.

While I never practiced with any of these individuals other than Judge Chapman, it is my privilege to have known three of them—Judge Wyche, Judge Russell, and Judge Chapman—and I am indeed privileged to be following in the footsteps of such distinguished jurists.

Thank you, Mr. Chairman.

The CHAIRMAN. It seems that your law firm generates judges.

Mr. HAMILTON. Yes, sir. My partners say that they hope that is a tradition that stops. [Laughter.]

The CHAIRMAN. I want to congratulate you on your appointment. I feel sure that you will make an outstanding judge and that we will all be proud of you.

Mr. HAMILTON. Thank you, Mr. Chairman.

The CHAIRMAN. Judge Moore, would you come forward?

TESTIMONY OF JUDGE JOHN H. MOORE II, NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF FLORIDA

Judge MOORE. Thank you, Mr. Chairman.

The CHAIRMAN. Would you like to introduce your family who are with you, Judge Moore?

Judge MOORE. Thank you, Mr. Chairman. Although the members of my family here are small in quantity, they are certainly high in quality. I would like to introduce my niece, Lisa Moore Hoke.

The CHAIRMAN. We are glad to have her with us.

Judge Moore, I believe you have two children.

Judge MOORE. Yes, sir.

The CHAIRMAN. You attended Cornell University. You just attended there 1 year, I believe.

Judge MOORE. One semester.

The **Chairman**. One semester. You received your B.S. degree from Syracuse University. You received your J.D. degree from the University of Florida.

Judge **Moore**. Yes, sir.

The **Chairman**. You served in the Navy from 1952 to 1956. Is that correct?

Judge **Moore**. That is correct, Mr. Chairman.

The **Chairman**. You were in an Atlanta law firm, Fisher & Phillips—for how long?

Judge **Moore**. Approximately 8 months. That was a law firm which limited its practice to labor law and management representation.

The **Chairman**. Then you moved to Fort Lauderdale, Fla., and practiced with Fleming, O'Bryan & Fleming from 1961 to 1967.

Judge **Moore**. Yes, sir.

The **Chairman**. From 1967 you were with Turner, Shaw & Moore. From 1967 to 1977 you were a judge with the seventeenth judicial circuit of Florida.

Judge **Moore**. That is correct.

The **Chairman**. Is that the highest trial court in Florida, with the power of death in criminal cases?

Judge **Moore**. Yes, sir.

The **Chairman**. And unlimited in civil cases for trial purposes?

Judge **Moore**. That is correct.

The **Chairman**. Judge Moore, you are presently chairman of the Judicial Qualifications Commission in Florida. Can you please tell the committee what recommendations, if any, you have for improvements in the judicial system?

Judge **Moore**. Mr. Chairman, within the Federal judicial system it is somewhat difficult to answer that question, not having been there, until I get there and see what problems may or may not exist.

In reference to my service as chairman of the Florida Judicial Qualifications Commission, I would like to see something with very strict guidelines, however, to avoid invasion of the independence of the judiciary, something similar to the Florida Qualifications Commission, implemented in the Federal system.

The **Chairman**. Judge, do you feel it would be helpful to you as a judge to have a sentencing commission to establish uniformity in sentencing?

Judge **Moore**. Mr. Chairman, in the sense of, would it be helpful to me? I do not think so. I think each sentencing judge has to determine the facts of the case before him and the appropriate sentence for the individual.

I do not believe in uniformity in sentencing for the sake of uniformity. I think each individual's background—although the crime may be identical, the background may dictate one course in one case and another course in another case.

The **Chairman**. We are now working to compile a Federal code. We passed this through the Judiciary Committee this week. Do you feel that would be of help to the bench and the bar and to the improvement of the administration of criminal justice?

Judge **Moore**. Mr. Chairman, I am not sure I understand the question. A Federal code?

The **Chairman**. A criminal code.

Judge **Moore**. A criminal code?

The **Chairman**. Yes. As you know, there is no criminal code now. We have passed a bill to codify all the criminal law and to modernize the code. Some antiquated provisions of the Federal law now are outdated and outmoded. There are many changes. I guess you have not had a chance to look into that.

Judge **Moore**. I am not aware of the provisions of the proposed code, but I certainly think that a code would be of help to the bench.

The **Chairman**. What are your views on penalties for second and third offense drug dealers? The drug problem now has gotten to be a very terrific problem in this country.

Judge **Moore**. With all due respect, Mr. Chairman, I am from southeast Florida, where, at the present time, the drug problem is probably worse than it is anywhere else in this country. Frankly, I do not think we should give them a chance for second and third offenses. I think this problem is one which is just deteriorating our whole society. It has virtually ruined southeast Florida.

I think that when we have some of these people who are making upwards of $100 million a year, I am told, in drugs and peddling these drugs to school-age children—on first offense I would put them away forever. On a second and third offense, there would be no question, if it ever got to that point, but that I would throw the key away frankly, to put it bluntly.

The **Chairman**. Judge Moore, it seems that many drug dealers, when arrested, are easily able to post enormous bonds and in some cases leave the country to resume their activities elsewhere. What changes in bail reform do you feel should be implemented in order to deter this type of activity?

Judge **Moore**. Mr. Chairman, when we start talking about bail reform, we are treading somewhat on thin ice from a constitutional standpoint. I do not think that we ought to attempt to reform the system because there might be a flaw in the system. It is true that some persons are putting up million-dollar bonds—cash bonds—and jumping bond, leaving the country, to foist their problems upon another society.

We have in Florida, under the capital punishment provisions, a provision where, if the presumption is evident and the proof is great that a capital crime has been committed, we can deny bond. I would suggest, after careful study, a similar provision for drug cases, where bond could be denied completely.

The **Chairman**. Do you feel that under the Constitution Congress makes the law and the policy of the country and the courts interpret it, or do you feel a judge has the right to use his own judgment in saying what the law should be?

Judge **Moore**. Senator, I am not an advocate of judicial activism. To the contrary, I am a strong opponent of it. I feel that the setting of policy and the passage of legislation is solely within the domain of the elected representatives of the people, their State legislatures, and the U.S. Congress. That is where it should be, and I do not think that the judges or the judiciary should impose their ideas of how society should run upon the people. That comes from the elected representatives.

The **Chairman**. From what you say, I presume you would not favor judicial activism.

Judge **Moore**. I do not, sir.

The **Chairman**. Thank you very much. You are now excused.

Judge **Moore**. Thank you for the opportunity to be here, Mr. Chairman.

The **Chairman**. Judge Cacheris?

TESTIMONY OF JUDGE JAMES C. CACHERIS, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF VIRGINIA

Judge **Cacheris**. Thank you, Mr. Chairman.

The **Chairman**. Judge Cacheris, I believe you were born in Pittsburgh.

Judge **Cacheris**. Yes, sir.

The **Chairman**. You are now living in Annandale, Va.

Judge **Cacheris**. Yes, sir.

The **Chairman**. You and your wife have four children?

Judge **Cacheris**. That is correct.

The **Chairman**. Would you like to introduce your family who are with you?

Judge **Cacheris**. I would be proud to, Senator. My wife Sally is here, my son John, and my twin daughters Mary and Michelle. The oldest, Anne, is on her way back from VPI for Thanksgiving break.

The **Chairman**. Thank you.

I believe the record shows you graduated from the University of Pennsylvania with a B.S. degree in economics in 1955 and George Washington University with a J.D. degree in 1960 with honors. Is that correct?

Judge **Cacheris**. That is correct, Senator.

The **Chairman**. You were born in Pittsburgh. Where did you grow up?

Judge **Cacheris**. Washington, D.C.—in this town, sir.

The **Chairman**. In this city?

Judge **Cacheris**. Yes, sir.

The **Chairman**. Then you moved across the river into Virginia?

Judge **Cacheris**. Yes, sir.

The **Chairman**. I believe your experience has been as follows: 1960 to 1962, as assistant corporation counsel in Washington, D.C.; 1962 to 1964, with Miller, Brown & Gildenhorn in Washington as an associate; 1964 to 1970, in private practice in Northern Virginia; 1970 to 1971, with Howard, Stevens, Lynch, Cacheris & Cake, Alexandria, Va.; 1971 to the present, as a judge with the 19th Judicial Circuit of Virginia, Fairfax, Va. Is that correct?

Judge **Cacheris**. Yes, sir.

The **Chairman**. Judge Cacheris, you are currently the chairman of the Judicial Conference Sentencing Committee as well as a past lecturer on the subject of sentencing with the new judges orientation program. Would you please describe for the committee how effective this sentencing committee is and why there is a need for such an organization?

Judge **Cacheris**. The committee came about in 1978 with a recognition by the Judicial Conference of Circuit Judges of the need for some guidelines to be set down on sentencing for all judges in the State of Virginia.

The committee was appointed, of which I was privileged to be chairman. We had a report of some guidelines and some recommendations to the judiciary, and the report was unanimously adopted by the Circuit Judges Conference in October of 1978.

The CHAIRMAN. Judge, you have also served as a lecturer with the Continuing Legal Education Seminar on Several Practice and Circuit Courts. With this background, would you give us your thoughts on the possibilities of requiring attorneys to undergo special training before being allowed to practice in Federal court?

Judge CACHERIS. I do not think there is any need in Virginia to have lawyers undergo special training to practice in the Federal courts. The civil rules of Virginia and the criminal rules are very similar to the ones in the Federal courts. I do not think there is any need for any special training.

The CHAIRMAN. Judge, how do you view the cooperation of Federal law enforcement agents and agencies with local law enforcement personnel? Do you feel that there are specific improvements that should be made in this area?

Judge CACHERIS. I think the cooperation has been excellent on the Federal and the State level. I notice that in Virginia on the State level the police are being better trained. They have their own fingerprint experts. We now have some laboratories in Virginia, specifically in northern Virginia, who are assisting the police on the basis of the handling of drug cases and other type cases.

The CHAIRMAN. Judge Cacheris, it has been suggested that our prison systems turn inmates into more professional criminals. What in your opinion can or should be done to improve prisoner rehabilitation?

Judge CACHERIS. I think some more emphasis on having drug programs, alcohol programs, and training programs for prisoners in the State of Virginia would be helpful. There are those programs, but we need more of them in order to help people to be rehabilitated and return back to society.

The CHAIRMAN. Judge, do you believe in the proposition that the Congress should make the law and the courts should interpret the law?

Judge CACHERIS. Yes, sir.

The CHAIRMAN. Would you classify yourself as a judicial activist, or how do you feel about that?

Judge CACHERIS. No, sir, I am not a judicial activist, I have not been for 10 years, and I oppose judicial activism.

The CHAIRMAN. That is all. Thank you very much.

Judge CACHERIS. Thank you, Senator.

The CHAIRMAN. Mr. David V. O'Brien, would you come around?

TESTIMONY OF DAVID V. O'BRIEN, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF THE VIRGIN ISLANDS

Mr. O'BRIEN. Thank you, Mr. Chairman.

The CHAIRMAN. Mr. O'Brien, where do you live in the Virgin Islands?

Mr. O'BRIEN. Mr. Chairman, I live in Christiansted, St. Croix.

The Chairman. What is the population of the Virgin Islands?

Mr. O'Brien. The population of the Virgin Islands, depending on whose figures you accept, varies between 80,000 and 100,000.

The Chairman. So you will be the only Federal judge?

Mr. O'Brien. No, sir. We have a chief judge sitting in St. Thomas, the Virgin Islands, at the present time.

The Chairman. You have two Federal judges in the Virgin Islands?

Mr. O'Brien. Yes, sir.

The Chairman. With that small population?

Mr. O'Brien. We have a very active docket on both islands. We are a legislative court, and we are the court of general jurisdiction for the Virgin Islands. We hear all felonies in excess of 5 years punishment.

The Chairman. Do you have any other courts, like State or local courts, or do you try all cases?

Mr. O'Brien. We have what is called a territorial court with minimal criminal jurisdiction and 50,000 civil limits.

The Chairman. The position for which you have been appointed is district judge?

Mr. O'Brien. Yes, sir.

The Chairman. Is that what you are referring to?

Mr. O'Brien. Yes. The only other judges besides the local territorial court are the two district court judges. That is for the Virgin Islands by special statute, as you know, a court of general jurisdiction for the Virgin Islands. So we have a number and variety of cases that perhaps other Federal courts do not encounter.

The Chairman. The position of U.S. district judge for the District of the Virgin Islands is not a lifetime position?

Mr. O'Brien. No, sir. That is a term for 8 years.

The Chairman. Mr. O'Brien, who recommended you for this position?

Mr. O'Brien. The President, as far as I know, and the Justice Department, Mr. Chairman.

The Chairman. I did not know whether your delegate down there recommended you.

Mr. O'Brien. The delegate recommended me, but as he is a member of the Democratic Party, the decision on that was left to the President himself.

The Chairman. He is in a different party from you?

Mr. O'Brien. Yes, sir. I do not believe that there is any senatorial courtesy involved in any of the Virgin Islands.

The Chairman. I see.

You were born in New Rochelle, N.Y., I believe.

Mr. O'Brien. Yes, sir.

The Chairman. You are married and have five children?

Mr. O'Brien. Yes, sir.

The Chairman. You received your B.A. degree from the University of Vermont in 1956 and your J.D. degree from Syracuse University College of Law in 1959.

Mr. O'Brien. That is correct, Mr. Chairman.

The Chairman. You served in the Marine Corps from 1950 to 1952.

Mr. O'Brien. Yes, sir.

The CHAIRMAN. And you have an honorable discharge?

Mr. O'BRIEN. Yes, sir, I do.

The CHAIRMAN. Your experience has been: General Electric Co., 1959, community relations training program; 1960 to 1961, county of Onondaga, as county research director for Syracuse; 1962 to 1964, in the same county as deputy county executive; 1964 to 1966, in private practice. Where was that?

Mr. O'BRIEN. In Syracuse, N.Y.

The CHAIRMAN. From 1966 to 1967 you were with Byrne, Costello & O'Brien, as a partner. Where is that?

Mr. O'BRIEN. Also in Syracuse, N.Y., Mr. Chairman.

The CHAIRMAN. From 1970 to 1971 you were self-employed in real estate in St. Croix. When did you move to the Virgin Islands?

Mr. O'BRIEN. I moved to the Virgin Islands in 1970, and they had a 1-year residency requirement before you could practice law.

The CHAIRMAN. I see. You had a private practice from 1971 to 1972 in St. Croix.

Mr. O'BRIEN. Yes, sir.

The CHAIRMAN. From 1972 to 1978 you were a member of the firm of Mervin, Alexander & O'Brien, as a partner. From 1978 to the present you have been a member of O'Brien & Moore as a partner. Is that right?

Mr. O'BRIEN. Yes, Mr. Chairman.

The CHAIRMAN. That completes your experience, I believe.

Mr. O'BRIEN. Yes, sir.

The CHAIRMAN. Have you ever been charged with any offense?

Mr. O'BRIEN. No, sir.

The CHAIRMAN. How do you feel about judicial activism?

Mr. O'BRIEN. I have been a proponent of the theories of judicial restraint. As I cited in my answer to the questionnaire, I was most impressed with the answers that Associate Justice O'Connor gave at her own hearings, which I came up to listen to.

The CHAIRMAN. Do you feel that Congress should make the law and the courts should interpret the law?

Mr. O'BRIEN. Unquestionably.

The CHAIRMAN. Mr. O'Brien, your legal experience has been primarily in the area of banking, real estate, and corporate law, I believe.

Mr. O'BRIEN. And in the last 6 years primarily also in the field of civil litigation.

The CHAIRMAN. Do you believe your relative lack of experience in criminal trial experience will hinder your effectiveness as a U.S. district judge?

Mr. O'BRIEN. I have personally tried everything from a first degree murder case down to burglaries and assault, because of the nature of the system in the Virgin Islands—the assignment of counsel system—and I am quite familiar with the Federal Rules of Evidence. I am confident that, with that experience and background, I can adapt to the trial of criminal cases.

The CHAIRMAN. I am wondering if, from your experience, you have any recommendations in the area of prison and sentencing reform which would reduce the number of second and third time offenders.

Mr. O'Brien. While I have not reviewed the Judiciary Committee's work this week, I have been following the progress of the Code of Criminal Procedure and the codification work that your committee has been doing over the last several years, and I have been particularly interested in its work on sentencing.

I do not have a panacea in the realm of recidivism. That is particularly a problem to us in the Virgin Islands because of the lack of rehabilitative facilities in the prison system down there, but I do not have any answers, other than the answers that others are giving, and that is education; vocational education opportunity; and, since so much is related to drugs, especially among younger prisoners, drug education, and drug freedom opportunities.

The Chairman. Do you have any recommendations for the committee concerning improvements in the administration of justice in our Federal courts?

Mr. O'Brien. I believe that your particular committee had a vote on a draft in the field of the criminal procedures this week that I followed closely. In the area of sentencing uniformity, in the area of bail reform particularly, I have been very much supportive of what your committee has been doing.

The Chairman. Mr. O'Brien, do you believe Congress should address the various problems that have arisen in the use of class actions in the Federal courts?

Mr. O'Brien. Well, in the Virgin Islands, Mr. Chairman, because we are a legislative court and we do not have diversity jurisdiction, we have not had to confront that too much, so I cannot express any familiarity in depth on that subject.

The Chairman. Is there anything else you would like to say to the committee?

Mr. O'Brien. I would just like to introduce to you, Mr. Chairman, my wife Janet, who is here with me from the Virgin Islands.

The Chairman. Would you have her stand?

[Mrs. O'Brien stands.]

The Chairman. We are glad to have you with us, Mrs. O'Brien.

Mr. O'Brien. Knowing the kind of day that you have personally had, I appreciate very much the courtesy and time that you have taken to extend to me as a nominee of the President.

The Chairman. We wish you success and good luck in your work.

Mr. O'Brien. I should also express at this time my appreciation to your chief investigator, who has shown me many, many courtesies since my nomination was presented.

The Chairman. He has a good reputation.

Mr. O'Brien. It is well earned. Thank you.

Mr. Short. Only if I do what the Senator says. [Laughter.]

The Chairman. Thank you very much.

I believe that completes all the hearings of the judges we have here. Is there any other matter to come before the committee?

[No response.]

The Chairman. Since we have now completed the hearings of these judges, the committee will stand in recess, subject to the call of the Chair.

[Whereupon, at 4:30 p.m., the hearing was recessed, subject to the call of the Chair.]

BIOGRAPHIES

RICHARD A. POSNER

NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT COURT OF APPEALS

Birth: January 11, 1939, New York City.

Legal residence: Illinois.

Marital status: Married to Charlene Horn Posner, two children.

Education: 1955-59— Yale College A.B. degree; 1959-62— Harvard Law School, LL.B. degree.

Bar: 1963—New York.

Experience: 1962-63—U.S. Supreme Court, clerk to Justice William Brennan; 1963-65—Federal Trade Commission, legal assistant to Commissioner; 1965-67—Department of Justice, attorney, Solicitor General's Office; 1967-68—President's Task Force on Communications Policy, General Counsel; 1968-69—Stanford Law School associate professor of law; 1969 to present—University of Chicago Law School, professor of law; and 1977 to present—Lexecon, Inc. president.

JOHN H. MOORE II

NOMINEE, U.S. DISTRICT JUDGE, MIDDLE DISTRICT OF FLORIDA

Birth: August 5, 1929, Atlantic City, N.J.

Legal residence: Florida.

Marital status: Married to Joan Kraft Moore, two children.

Education: 1947—Cornell University;1948-52—Syracuse University, B.S. degree; 1958-61—University of Florida, J.D. degree.

Bar: 1961—Florida.

Military service: 1952-56—United States Navy.

Experience: 1961 Fisher & Phillips, Atlanta, Ga., associate; 1961-67—Fleming, O'Bryan & Fleming, Fort Lauderdale, Fla., associate (1961-64), partner (1964-67); 1967—Turner, Shaw & Moore, Fort Lauderdale, Fla., partner; 1967-77—judge, 17th Judicial Circuit of Florida; and 1977 to present—judge, 4th District Court of Appeal.

JAMES C. CACHERIS

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF VIRGINIA

Birth: March 30, 1933, Pittsburgh, Pa.

Legal residence: Virginia.

Marital status: Married to Sally Anne Ricci, four children.

Education: 1951-55—University of Pennsylvania, B.S. degree in Economics; 1957-60—George Washington University, J.D. degree.

Bar: 1962—Virginia.

Military service: 1955-57—United States Army, 1st Lt.

Experience: 1960-62—Assistant Corporation Counsel, Washington, D.C.; 1962-64—Miller, Brown & Gildenhorn, Washington, D.C., associate; 1964-70—private practice, Northern Virginia; 1970-71—Howard, Stevens, Lynch, Cacheris & Cake, Alexandria, Va., partner; 1971-present—judge, 19th Judicial Circuit of Virginia, Fairfax, Va.

JESSE E. ESCHBACH

NOMINEE, U.S. CIRCUIT JUDGE, SEVENTH CIRCUIT COURT OF APPEALS

Birth: October 26, 1920, Warsaw, Indiana.

Legal residence: Indiana.

Marital status: Married to Sara Walker Eschbach, two children.

Education: 1939-43—Indiana University, B.S. degree; 1946-49—Indiana University Law School—J.D. degree.

Bar: 1949—Indiana.

Military service: 1943-46—U.S. Navy, Lieutenant (j.g.).

Experience: 1949-54—Graham & Eschbach; 1954-62—Graham, Rasor, Eschbach & Harris; 1951—Office of Price Stabilization, Washington, D.C., Attorney-Advisor; 1952-54—Deputy prosecuting attorney, Kosciusko County; 1952-53—City attorney, Warsaw, Ind.; 1959-62—Dalton Foundries, Inc., secretary of board of directors; 1960-

62--Endicott Church Furniture Co., Inc., president; 1962 to present—U.S. District Judge, Northern District of Indiana.

CLYDE H. HAMILTON

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF SOUTH CAROLINA

Birth: February 8, 1934, Edgefield, S.C.

Marital status: Married to Mary Spillers Hamilton, two children.

Education: 1952-56—Wofford College, B.S. degree; 1958-61—George Washington University, J.D. degree.

Bar: 1961—South Carolina.

Military service: 1956-58—U.S. Army.

Experience: 1961-63—J.R. Folk, Esq., Edgefield, S.C., associate; 1963 to present, Butler, Means, Evins & Browne, Spartanburg, S.C., partner.

DAVID V. O'BRIEN

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF THE VIRGIN ISLANDS

Birth: June 19, 1932, New Rochelle, N.Y.

Legal residence: Virgin Islands.

Marital status: Married to Janet Burgess O'Brien, five children.

Education: 1952-56—University of Vermont, B.A. degree; 1956-59—Syracuse University, College of law, J.D. degree.

Bar: 1960—New York; 1971—Virgin Islands.

Military service: 1950-52—U.S. Marine Corp, Honorable discharge.

Experience: 1959—General Electric Co., community relations training program; 1960-61—County of Onondaga, county research director, Syracuse, N.Y.; 1962-64—County of Onondaga, deputy county executive; 1964-66—Private practice; 1966-70—Byrne, Costello & O'Brien, partner; 1970-71—Self-employed in real estate, St. Croix, U.S.V.I.; 1971-72—Private practice, St. Croix, U.S.V.I.; 1972-78—Merwin, Alexander & O'Brien, partner; 1978-present—O'Brien & Moore, partner.

CONFIRMATION HEARING ON: EDWARD R. BECKER, ROBERT G. DOUMAR, AND JACKSON L. KISER

WEDNESDAY, NOVEMBER 25, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:20 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond and Specter.

Staff present: Duke Short, chief investigator; and Pamela Swanner, clerk.

The CHAIRMAN. The hearing will come to order.

NOMINATION OF EDWARD R. BECKER, ROBERT G. DOUMAR, AND JACKSON L. KISER

The CHAIRMAN. I am pleased today to have before the committee, Judge Edward R. Becker of Pennsylvania, who has been nominated for the position of circuit judge for the Third Circuit Court of Appeals; Robert G. Doumar of Virginia, who has been nominated to be U.S. district judge for the Eastern District of Virginia; and Jackson L. Kiser of Virginia, to be U.S. district judge for the Western District of Virginia.

I believe we have a couple of Senators here. We generally take them first in order for them to be excused.

Senator Heinz, I believe you are here to recommend a circuit judge. That is the highest position we have today. We will be glad to hear from you at this time.

STATEMENT OF HON. JOHN HEINZ, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator HEINZ. Mr. Chairman, thank you very much.

It is my privilege to introduce Ed Becker to you and to the members of the committee for consideration of his appointment to the Third Circuit Court of Appeals. Judge Becker has made an absolutely outstanding contribution to the State of Pennsylvania as both a politician and a Federal judge.

He is accompanied here today by another member of the Pennsylvania legal community, his wife Flora, and one of his three children, his 11-year-old son Chip. We are delighted to have them.

I must say in the case of Judge Becker, our party, Mr. Chairman, the Republican Party, really suffered a great loss when he became a Federal judge. He has been a remarkable judge, as demonstrated by the American Lawyer, having selected him in their July 1980 issue as the outstanding district court judge in the entire third circuit. I would introduce as evidence before the committee that article if there be no objection, Mr. Chairman.

The CHAIRMAN. Without objection, we will insert that in the record.

Senator HEINZ. It is also true that his hallmark has been his hard work and his ability to master every detail of enormously complex cases. In particular, I would like to draw to the committee's attention an article in the March 11, 1981, Legal Times of Washington, D.C. It details Judge Becker's resolution with a 586-page summary judgment ruling of the infamous 11-year-old Japanese electronics products litigation. I would ask that that be part of the committee record as well, Mr. Chairman.

The CHAIRMAN. Without objection, it will be admitted.

Senator HEINZ. William Wordsworth once said, Mr. Chairman, that poetry is the breadth and finer spirit of all knowledge. Ed Becker has demonstrated in this instance, too, both the breadth of his knowledge and his exceptional spirit by doing no less than writing an entire opinion in verse. I commend that decision in verse to the committee. I would urge that it be introduced as evidence on Judge Becker's behalf as well.

The CHAIRMAN. We will file that for the record with the committee.

[Articles referred to by Senator Heinz follow:]

[From the American Lawyer, July 1980]

THIRD CIRCUIT

(By Robert Windrem)

BEST—EDWARD BECKER, 47, APPOINTED BY NIXON IN 1970

When Philadelphia lawyers heard that President Nixon had nominated Edward Becker to the federal bench in 1970, they thought they were going to be stuck with a mediocre judge. Becker, then 37, had scant credentials: after his graduation from Yale Law School in 1957, he went directly into practice with his father and brother-in-law in the then three-lawyer general-interest firm. During his years there, Becker served as associate general counsel for the Philadelphia Republican Committee. "Nobody, and I mean nobody, expected Becker to be a good judge," says a litigation partner at one of Philadelphia's top firms. "But he is the exception that proves the rule about political appointees. We got our money's worth without even trying."

"I did not come out of the merit system," Becker admits, with only the slightest trace of a smile. "I came out of the political system." Yet Becker ranks highest among a group of top Third Circuit judges that includes the Eastern District of Pennsylvania's outstanding chief judge, Joseph Lord; New Jersey's H. Curtis Meanor, several of whose controversial criminal decisions have recently been upheld by the Supreme Court; and John Gerry, another New Jersey judge whose excellence led one Philadelphia lawyer to say, "I just wish we could get him out of Camden," the New Jersey city across the Delaware River.

Although Becker had earned a reputation as one of the Eastern District's better judges, he did not attract national attention until 1977, when he became the seventh judge to handle the massive Japanese electronics dumping cases brought by Zenith and National Union Electronics in 1970. One of Becker's first important challenges in the case came from the out-of-town lawyers representing the Japanese manufacturers, who wanted to strike Zenith's demand for a jury trial. In a 100-page decision handed down in June 1979, Becker denied the motion, gaining the respect of the lawyers from both sides with a scholarly opinion that dealt with both the constitutional history and public policy requirements of trial by jury. He added to his reputation in April of this year with an opinion granting, in part, Zenith's motion for summary judgment under the 1916 Antidumping Act, again taking a scholarly view, which included the political, social and legal aspects of that act.

"He likes to write," says one of the defense counsels. "He likes to be," as he says, "out there on the cutting edge of the law, being part of the development of the law."

In the Zenith case, Becker also proved himself capable of defusing long-standing animosities. At one point, he gathered 40 lawyers from both sides in his chambers to watch a cement mason set a framed copy of Becker's case management order in concrete. Becker initiated this unique cermony because, he says, "I knew I had to do something. It was really getting ugly. I had this one lawyer who kept saying, 'Until the case management order is set in concrete . . .' So finally I told him, 'that's just what we'll do.' " The ceremony ended with the usually staid Edwin Rome, of Philadelphia's Blank, Rome, Comisky & McCauley, Zenith's lead counsel, reaching across the concrete to shake hands with Donald Zoeller of New York's Mudge Rose Guthrie & Alexander, lead counsel for the defendants. Rome donned a mason's cap, and Lynch wore a T-shirt emblazoned with "Concrete Masons Union Local 189," after the case's MDL docket number. According to one lawyer from Weil, Gotshal & Manges (Matsushita's counsel), that ceremony, as much as his opinions, won Becker plaudits from all the lawyers involved in the case as "a sensitive, intelligent judge who knows how to bring intelligent management to a case."

Becker's tactics are often unconventional. In a 1974 admiralty case, he wrote his decision in poetry reminiscent of the "The Ancient Mariner"—and it was reported in the same style. On another occasion last fall, he took his court to a mushroom composting plant to determine whether the work of employees in the plant was agricultural in nature, the central issue in a tax case. "We saved two days of expert witness testimony by going to that mushroom composting plant," he declares.

Lawyers say they are continually amazed at Becker's ability to keep abreast of their cases. Says one lawyer involved in the Japanese litigation, "We are sending him 50 to 60 *pounds* of documents a week, and he has been amazing in the way he can grasp every major argument." An ACLU litigator adds that "when you go to a conference with him, you know he's not going to be surprised at anything you say. He will know your argument and will have thought it through in advance."

The only criticism leveled at Becker is that he will sometimes involve himself too much in a case, a criticism Becker agrees with in part. "There's a modicum of truth in that. I get involved, but I'm trying the case for both sides, and lawyers are often afraid to get to the tender middle, where the best decisions are made. After all, a judge is just a lawyer in robes."

[From the Legal Times of Washington, May 11, 1981]

JUDGE BECKER CUTS 11-YEAR MONSTER DOWN TO SIZE

(By Larry Lempert, Legal Times Staff)

(Virtually all our recommendations for expediting potentially protracted cases require strong judicial control. . . . "Effective judicial management must be early, continuous, active and knowledgeable."—National Commission for the Review of Antitrust Laws and Procedures, "Report to the President and the Attorney General," Jan. 22, 1979.)

The Japanese Electronic Products Antitrust Litigation, now in its 11th year, is the kind of monster that makes the judicial system wonder about its ability to cope with modern antitrust lawyering. But the federal district judge handling the litigation, Edward R. Becker of Philadelphia, seems to have cut the dragon down to size. His sword? Precisely the one urged upon judges by the antitrust review commission: active, knowledgeable involvement.

Becker brought the litigation to a decisive juncture with a voluminous summary judgment ruling (Zenith Radio Corp. v. Matsushita Electric Industrial Co., Ltd., MDL 189, March 27, 1981). In a 586-page slip opinion that reviewed the factual record and legal issues in excruciating detail, Becker held that plaintiffs Zenith and National Union Electric Corp. (NUE) had produced no probative evidence of a conspiracy by Japanese manufacturers to take over the U.S. market for television receivers.

The case got to this point, in large part, because Becker involved himself in the nittiest of the gritty, spending the better part of his time on it for more than three years. His close attention to the litigation is evident from the record, which includes nine other published opinions by Becker. His command of the case was also noted (and praised) by a half-dozen key defense lawyers in recent interviews.

(Plaintiffs' lawyers at Blank, Rome, Comisky & McCauley of Philadelphia refused, through partner William H. Roberts, to comment on the management of the Japanese antitrust litigation. Philip J. Curtis, vice president and general counsel of Zenith, referred questions to the Blank, Rome firm.)

In one opinion last year, Becker estimated that during the first year and a half of his "stewardship" of the case, he'd spent close to half his time on it, largely on regular, day-long pretrial conferences, on telephone conferences (never a week without two or three), and on correspondence (an average of 15 letters a week from counsel). As the case entered its more critical phases, he estimates now, his time on it increased to perhaps 70 percent—and that's 70 percent of a seven-day workweek, including work at night.

Becker, in an interview May 6, discussed his experience in managing the case, although he emphasized that he could not comment on the case itself (now pending on appeal before the 3rd Circuit). "In many respects," he warned, "the Japanese antitrust litigation is sui generis." Yet Becker's philosophy of personal and often informal involvement can certainly be applied to the management of other complex cases, even if they don't involve the range of issues, numbers of documents, and acrimony among litigants that this one does.

MILLIONS OF DOCUMENTS

By any measure, the litigation is a blockbuster. Donald J. Zoeller of Mudge Rose Guthrie & Alexander (New York), who is the chief defense coordinating counsel, estimates that 30 million pages of documents were exchanged in discovery. When the plaintiffs, at the judge's direction, submitted a final pretrial statement, it was 17,000 pages along and listed 250,000 documents (many in Japanese) upon which they were relying. During the critical period last year when arguments on evidence and summary judgment motions were being considered (Jan. 1, 1980, to Oct. 1, 1980), the parties filed 114 briefs or memoranda estimated to total 7,500 pages, the judge noted in his summary judgment opinion.

In separate suits, the two plaintiffs named 24 defendants. The principal ones are seven Japanese manufacturers, a Japanese trading company, and two American companies. (They also identified nearly 80 alleged co-conspirators whom they did not sue.)

The plaintiffs raised almost every antitrust issue in the books, alleging violations of Sherman Act §§ 1 and 2, the Wilson Tariff Act, the 1916 Antidumping Act, the Robinson-Patman Act, and Clayton Act § 7. The underlying charge, as stated by the judge: that the defendants engaged in "a (successful) conspiracy to charge artifically high prices to consumers in Japan which funded or 'war-chested' a (successful) conspiracy to sell in the U.S. at artifically low prices."

NUE filed the first complaint in New Jersey on Dec. 21, 1970. In 1974, Zenith filed in Philadelphia (where the cases were consolidated). Only in November 1977, however, did the litigation land in Becker's lap, after six other judges had handled it.

The problems included the death of two judges, the recusal of one, and the elevation of Becker's immediate predecessor, A. Leon Higginbotham, to the 3rd Circuit. Becker and the lawyers in the case credit Higginbotham with making substantial inroads: he disposed of defendants' challenges to jurisdiction and venue, to the constitutionality of the Antidumping Act, and to the application of the Robinson-Patman Act to international price discrimination.

Becker, 48, came to the bench in December 1970—just 10 days before the filing of the first of the Japanese antitrust actions. As he entered the litigation, which was still dragging through discovery, Becker spent a lot of time talking to counsel, delving to find the real problem areas, Zoeller says. Not surprisingly, over seven years a spirit of contentiousness had developed, which Becker would later describe in an opnion: "Suffice it to say that the case has been attended, through much of its course, by constant acrimony, recriminatory rhetoric, and a significant failure of the parties to cooperate or stipulate to anything, even routine matters such as extension of deadlines." Routine matters, he noted elsewhere, "all too frequently have involved my personal intervention; I have resolved literally hundreds of problems involving scheduling of depositions, deadlines for production of documents and responses to interrogatories."

The parties got their "marching orders," as Zoeller puts it, in March 1979, when Becker issued Pretrial Order No. 154. The judge laid out a finely detailed timetable listing 63 steps intended to wrap up discovery and move the case to an October 1980 trial.

The centerpiece of the order: the requirement that the parties file Final Pretrial Statements (FPSs), listing with particularity each fact intended to be proved at trial, the witnesses whose testimony would support each fact, and the documents or portions of depositions, interrogatory answers, or admissions that would be offered to prove each fact. Except for good cause shown, the parties would be precluded from offering at trial any facts or evidence not disclosed in the FPS. (Plaintiffs' FPS was filed in October 1979; defendants' FPS on their counterclaims was filed in January 1980, but they never got to the point of filing an FPS regarding their defense.)

Requiring an extensive pretrial statement is a common tool for complex case management. However, the demand for a narrowly drawn statement with preclusive effect should "very rarely" be imposed. Becker acknowledges. The danger, he says, is that "lawyers will throw in everything if it's preclusive."

In his summary judgment opinion, Becker stated, "The FPS was required in part as a surrogate for incomplete responses to discovery by the plaintiffs, who had theretofore failed, despite several voluminous waves of interrogatories . . . to set forth adequately the specifics of their claims."

The record shows that from this point on, the key theme of Becker's involvement in the case was his striving for specificity, looking for ways to hone the mass of evidence into manageable form. When the plaintiffs' FPS failed to identify the evidence *aliunde* that would link each defendant to the alleged conspiracy, Becker ordered an evidence *aliunde* list. (Evidence rules require independent evidence of the existence of a conspiracy before "co-conspirator" declarations are admitted into evidence. Without such declarations, it was clear that the plaintiffs would have trouble establishing a conspiracy case against most of the defendants.)

When the seven-volume, three-foot-high evidence *aliunde* list identified virtually all the documents referenced in the FPS, Becker ordered that an unusually extensive trio of pretrial evidentiary hearings be held. The hearings would have a dual purpose: to allow a pretrial determination of the sufficiency of the evidence *aliunde*; and to assess the admissibility of key evidence (on the premise that a summary judgment motion has to be decided on the basis of admissible evidence.)

The hearings last June and July took five weeks. For review at these hearings, the plaintiffs were directed to describe each of their key documents on a document submission form: the form would then go to the defendants, who would note their objections.

In August 1980, still striving for specificity, the judge held summary judgment arguments for seven days (he had heard arguments for five days a year earlier). "We invited counsel to take as much time as was necessary to go through the entire record and call our attention to any documents, testimony, or other evidence which bore on the existence of a genuine issue of material fact," the judge's summary judgment opinion said. The defense accepted the invitation, the opinion noted; the plaintiffs did not. (The plaintiffs "studiously avoided dealing with any specific documentary evidence during their oral argument." the opinion said.)

Some judges wade into a case; some splash around a bit. Becker, clearly, had dived in head first and was swimming day and night. "My philosophy," he understates, "is for the judge to get fully familiar with the case," Says one defense attorney, "He knew more about this case than any individual lawyer involved. That's how familiar he became with it."

Becker speaks of a need to monitor a case continuously. In the Japanese antitrust litigation, he held pretrial conferences in court at least two or three days per month and made ample use of telephone conferences (with as many as 25 attorneys on the line).

He prefers to settle most non-substantive matters orally and informally, to reduce the flow of paperwork, save time, and nip problems in the bud. The general rule, he says, was "forget the motion papers. You've got a problem, you call me on the phone."

These conferences and discussions produced more than 300 printed pretrial orders, but the number of decisions made is far greater than that. Many of those orders consist of the transcript of a full day of conferencing. Other discussions on routine matters were not recorded.

Lawyers in the case say that Becker paid close attention to documents, studying them himself rather than relying on counsel's description of them. To ease his access to the materials, the judge had turned his jury room into a depository for all documents that would be relied upon in summary judgment arguments or at trial. Becker noted in his summary judgment opinion that he looked for certain documents cited by the plaintiffs and couldn't find them, and that many others had never been translated from the Japanese.

The federal court in Philadelphia accommodated Becker's need to involve himself so fully in the Japanese antitrust litigation. During the critical half-year or so beginning last spring, he was "taken off the wheel," he says; although he continued to monitor his existing load of "a couple hundred cases," he was assigned no new ones.

SOUND, FURY, EXPENSE

Becker's familiarity with the case resulted in a summary judgment opinion that scrutinized the facts with intense care. His conclusion, on page 585: "Summary judgment must be granted so as to put an end to this ten-year-old case which, notwithstanding all its sound and fury and the generation of tens of millions of documents and staggering legal fees, has produced nothing, we repeat, nothing which justifies our permitting it to go forward into a trial which will last a year or more, with countless untold further burdens and expense upon the parties, their counsel, and the court system."

Attorneys estimate that 150 lawyers worked on the case. Some of the most active, in addition to Edwin P. Rome and Roberts for the plaintiffs and Zoeller for the defense, were these defense lawyers: John P. Hederman and Thomas P. Lynch of Mudge Rose; Henry T. Reath of Duane, Morris & Heckscher (Philadelphia); Ira Millstein, A. Paul Victor, Joel B. Harris, and Kevin P. Hughes of Weil, Gotshal & Manges (New York); Carl W. Schwartz of Metzger, Shadyac & Schwartz (D.C.); and Louis A. Lehr Jr. of Arnstein, Gluck, Weitzenfeld & Minow (Chicago).

Other law firms included Drinker, Biddle & Reath (Philadelphia); Crummy, Del Deo, Dolan & Purcell (Newark); Baker & McKenzie (Chicago); Reid & Priest (New York); Morgan, Lewis & Bockius (Philadelphia); Tanaka, Walders & Ritger (D.C.); Hunt, Kerr, Bloom & Hitchner (Philadelphia); Wender, Murase & White (New York); Dechert, Price & Rhoads (Philadelphia); Whitman & Ransom (New York); Rosenman, Colin, Freund, Lewis & Cohen (New York); Kaye, Scholer, Fierman, Hays & Handler (New York); Wolf, Block, Schorr & Solis-Cohen (Philadelphia); and Kirkland & Ellis (Chicago).

Richard MACKENSWORTH
v.
AMERICAN TRADING TRANSPORTATION CO.
Civ. A. No. 73-943.

United States District Court,
E. D. Pennsylvania.
Nov. 19, 1973.

A seaman, with help of legal sages,
Sued a shipowner for his wages.
The defendant, in New York City
(Where served was process without pity)
Thought the suit should fade away,
Since it was started in Pa.
The District Court there (Eastern District)
Didn't feel itself restricted
And in some verse by Edward R. Becker, J.,
Let the sailor have his day.
The owner, once to earn freight fare,
Sent ship to load on Delaware.
Since it came to reap in port,
T'was turnabout to show in court,
With process so to profit tied.

Motion to dismiss denied.

1. Process 🔑62
Long-arm service is a procedural tool
Founded upon a "doing business" rule. 42 Pa. S. § 8309.

2. Courts 🔑12(2)
A New York shipowner which, to its later dismay
Loaded a ship in Philly, Pa.
In the year of Our Lord 1972
Could be served in a suit there by seafarer who
Claimed that his wages were long overdue,
Since the loading, in the learned court's ken of it
Was a single act done for pecuniary benefit
And thus doing business (for profit to boot)
Within the state's long-arm statute.
46 U.S.C.A. § 594; 42 Pa. S. § 8309 (a)(3).

3. Courts 🔑12(2)
Under the Commonwealth statute providing
That in cases of persons elsewhere residing,
"The doing of a single act * * * for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts."
No future intention is needed
When "pecuniary profit" is heeded;
One acting from profit ambition
Need not contemplate repetition.
42 Pa. S. § 8309(a)(3).

4. Courts 🔑12(2)
Lest the long-arm statute make all nervous
It was amended to avoid guess
And to extend long-arm service
To the full reach of due process.
42 Pa. S. § 8309.

5. Constitutional Law 🔑305(6)
A New York shipowner who
Once sent its vessel over the blue
For loading in Philly, in '72
Could be sued there, to its rue
In accord with process due
Under International Shoe.

◆

Cohen & Lore, Harry Lore, Philadelphia, Pa., for plaintiff.

Krusen, Evans & Byrne, E. Alfred Smith, T. J. Mahoney, H. Wallace Roberts, Philadelphia, Pa., for defendant.

OPINION AND ORDER

EDWARD R. BECKER, District Judge.

The motion now before us
has stirred up a terrible fuss.

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1. In nautical terms, the wage statute is stowed
at § 594 of 46 U.S.Code.

And what is considerably worse,
it has spawned some preposterous doggerel verse.
The plaintiff, a man of the sea,
after paying his lawyer a fee,
filed a complaint of several pages
to recover statutory wages.[1]
The pleaded facts remind us of a tale that is endless.
A seaman whom for centuries the law has called "friendless"
is discharged from the ship before voyage's end
and sues for lost wages, his finances to mend.
The defendant shipping company's office is based in New York City,
and to get right down to the nitty gritty,
it has been brought to this Court by long arm service,[2]
which has made it extremely nervous.
[1] Long arm service is a procedural tool
founded upon a "doing business" rule.
But defendant has no office here, and says it has no mania
to do any business in Pennsylvania.
Plaintiff found defendant had a ship here in June '72,
but defendant says that ship's business is through.
Asserting that process is amiss,
it has filed a motion to dismiss.
Plaintiff's counsel, whose name is Harry Lore,
read defendant's brief and found it a bore.
Instead of a reply brief, he acted pretty quick
and responded with a clever limerick:

> "Admiralty process is hoary
> With pleadings that tell a sad story
> Of Libels in Rem—
> The bane of sea-faring men
> The moral:
> Better personally served than be sorry."

Not to be outdone, the defense took the time
to reply with their own clever rhyme.
The defense counsel team of Mahoney, Roberts, & Smith
drafted a poem cutting right to the pith:

> "Admiralty lawyers like Harry
> Both current and those known from lore
> Be they straight types, mixed or fairy
> Must learn how to sidestep our bore.
>
> For Smith, not known for his mirth
> With his knife out for Mackensworth
> With Writs, papers or Motions to Quash
> Knows that dear Harry's position don't wash."

Overwhelmed by this outburst of pure creativity,
we determined to show an equal proclivity.
Hence this opinion in the form of verse,
even if not of the calibre of Saint-John Perse.
The first question is whether, under the facts,
defendant has done business here to come under Pennsylvania's long arm acts.[3]
If we find that it has, we must reach question two,

---

[2] Long arm service is effected, not by stealth,
but through the Secretary of the Commonwealth.

[3] Designed to relieve the plaintiff's service burdens,
Pennsylvania's latest long arm law may be found at § 8309 of 42 Purdon's.

[4] That decision of the Supreme Court of Courts
may be found at page 310 of 326 U.S. Reports. [66 S.Ct. 154, 90 L.Ed. 95]

[5] The words of the statute are overly terse,
still we will quote them, though not in verse:

whether that act so applied is constitutional under Washington v. International Shoe.[4]

Defendant runs a ship known as the SS Washington Trader,
whose travels plaintiff tracked as GM is said to have followed Nader.
He found that in June '72 that ship rested its keel
and took on a load of cargo here which was quite a big business deal.

[2] In order for extraterritorial jurisdiction to obtain,
it is enough that defendant do a single act in Pa. for pecuniary gain.
And we hold that the recent visit of defendant's ship to Philadelphia's port
is doing business enough to bring it before this Court.

[3] We note, however, that the amended act's grammar[5]
is enough to make any thoughtful lawyer stammer.
The particular problem which deserves mention
is whether a single act done for pecuniary gain also requires a future intention.

[4] As our holding suggests, we believe the answer is no,
and feel that is how the Pa. appellate cases will go.
Further, concerning § (a)(3)'s "shipping of merchandise"
the future intention doctrine has already had its demise.[6]
We do not yet rest our inquiry,
for as is a judge's bent,
we must look to see if there is precedent.[7]
And we found one written in '68 by three big wheels
on the Third Circuit Court of Appeals.
The case, a longshoreman's personal injury suit,
is Kane v. USSR,
and it controls the case at bar.
It's a case with which defendants had not reckoned,
and may be found at page 131 of 394 F.2d.
In *Kane*, a ship came but once to pick up stores
and hired as agents to do its chores
a firm of local stevedores.
Since the Court upheld service on the agents,
the case is nearly on all fours,
and to defendant's statutory argument
Kane closes the doors.
Despite defendant's claim that plaintiff's process is silly,
there have been three other seamen's actions against defendant, with service in Philly.
And although they might have tried to get the service corrected,
the fact of the matter is they've never objected.[8]

---

[5] (a) General rule.—Any of the following shall constitute "doing business" for the purposes of this chapter:

. . . . .

(2) The doing of a single act in this Commonwealth for the purpose of thereby realizing pecuniary benefit or otherwise accomplishing an object with the intention of initiating a series of such acts.

(3) The shipping of merchandise directly or indirectly into or through this Commonwealth.

42 Pa. S. § 8309.

[6] *See* Aquarium Pharmaceuticals Inc. v. Industrial Pressing and Packaging (E.D.Pa. 1973).
Prospects for suit on a single goods shipment are decidedly greener
because of the *Aquarium* decision of Judge Charles R. Weiner,
holding that, in a goods shipment case no future intention is needed;
the message of *Aquarium* we surely have heeded.
Anyone who wishes to look *Aquarium* up
can find it at p. 441 of 358 F.Supp.

[7] We thus reject the contention that
one of the judicial vices
is too much reliance on *stare decisis*.

[5] We turn then to the constitutional point,
and lest the issue come out of joint,
it is important that one thought be first appended:
the reason the long arm statute was amended.

The amendment's purpose was to eliminate guess
and to extend long arm service
to the full reach of due process.[9]
And so we now must look to the facts
to see if due process is met by
sufficient "minimum contacts."[10]

The visit of defendant's ship
is not yet very old,
and so we feel constrained to hold
that under traditional notions of substantial justice and fair play,[11]
defendant's constitutional argument does not carry the day.

This Opinion has now reached its final border,
and the time has come to enter an Order,
which, in a sense, is its ultimate crux,
but alas, plaintiff claims under a thousand bucks.

So, while trial counsel are doubtless in fine fettle,
with many fine fish in their trial kettle,
we urge them not to test their mettle,
because, for the small sum involved,
it makes more sense to settle.

In view of the foregoing Opinion, at this time
we enter the following Order, also in rhyme.

ORDER

Finding that service of process is bona fide,
the motion to dismiss is hereby denied.
So that this case can now get about its ways,
defendant shall file an answer within 21 days.

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[8] **Berrios v. American Trading & Production Co. (AT&P) (defendant's predecessor), C.A. 68–47;**
Gibson v. AT&P, C.A. 68–1466.
And in Battles v. AT&P., C.A. 73–102, in this very annum,
service on the Secretary of the Commonwealth
was authorized by Judge John B. Hannum.

[9] ***See* Aquarium Pharmaceuticals Inc. v. Industrial Presing & Packaging, *supra*, at 444.**

[10] ***See* International Shoe v. State of Washington, *supra*, at 316.**

[11] ***See* id.**

Senator HEINZ. Mr. Chairman, I thank you.

Before I yield to my colleague, Senator Specter, let me just say that prior to his appointment to the U.S. district court in 1970, Ed Becker was a leader of the Republican Party in Philadelphia. He served as associate general counsel to the Philadelphia City Committee and as a member of the party's policy committee.

It is worth noting that during those years he helped a struggling young lawyer by the name of Arlen Specter to get his start in politics by working to elect him district attorney in Philadelphia. I might add that the good judgment he showed in assisting now Senator Specter has been carried over into all his judicial opinions.

Mr. Chairman, I can say without reservation that Judge Becker is known extraordinarily well to members of the Pennsylvania legal community and, indeed, the national legal community. He is superbly qualified to fill the vacancy left by the retirement of another excellent judge, Max Rosen, of Wilkes-Barre.

I believe an examination of the record will show that he has the dedication, the intelligence, and the legal understanding of the complex issues that is necessary in an appeals court judge, and I do urge the committee to approve his nomination.

The CHAIRMAN. If he comes up to the high recommendation you have given him, Senator Heinz, he will certainly make an outstanding circuit judge.

We will be glad now to hear from Senator Specter, the other Senator from Pennsylvania.

STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA

Senator SPECTER. Thank you, Mr. Chairman.

Preliminarily, I want to thank you, Senator Thurmond, and staff for expediting this hearing. It is very much appreciated. Of the many enjoyable moments that I have had in my short tenure in the U.S. Senate, this, to present Judge Edward R. Becker to the Committee on the Judiciary for consideration of his nomination to the Court of Appeals for the Third Circuit, is the most enjoyable.

There is much to recommend Judge Becker. My colleague, Senator Heinz, has already introduced all of the evidence in a very lawyerly way and has made a complete record, which only leaves it to me to pontificate, as I shall do only briefly.

When surveying Judge Becker's accomplishments, I do not think it should be held against him, as Senator Heinz has noted, that he got me on my start in politics to become a Member of the U.S. Senate and of this committee.

I have known Judge Becker going back to our days in college. He entered the University of Pennsylvania in 1950. I was slightly ahead of him. We were debating colleagues. I observed his scholarship and his ability as a student at the university where he graduated Phi Beta Kappa. He then went on to the Yale Law School, having his choice of any legal institution in the country, and distinguished himself academically there and graduated in 1957.

At that point he returned to the city of Philadelphia to practice with his father in the firm of Becker & Becker. Herman Becker was a very distinguished Philadelphia lawyer. He was his son's mentor and set a very fine example which his son pursued and, I think it is fair to say, surpassed.

Judge Becker was very active as counsel to the Republican Party and argued some of the really landmark cases on public issues: reapportionment, election code, and a wide variety of matters. He came to the U.S. Court for the Eastern District of Pennsylvania in 1971, having distinguished himself in an unusual way with a fine academic record coupled with fine experience and then having a political backing as well. That is really unique. So often people with one quality do not possess the others.

He has graced the district court with some of the most erudite opinions in some of the toughest cases in the past decade. I think it is fair to say that he stands in a unique position on that 19-judge court.

His appointment to the court of appeals is, I think, a real opportunity for that court to have the benefit of his experience. He comes to that position at a very early age. I was about to speculate 46 or 47, but Judge Becker points out to me that he is 48.

As Senator Heinz has noted, Judge Becker's wife is here today. She is a distinguished lawyer in her own right. They have a beautiful family, two young sons and a young daughter. My only regret when I had him for lunch today was that his other two children were not here, but it may not be too long before he may be back for another confirmation hearing.

Along with my senior colleague, Senator Heinz, it is a great pleasure to present Judge Becker for the consideration of the committee.

The **Chairman**. Judge Becker, you come highly recommended by two very able and distinguished Senators, both of whom are held in high esteem in this body. Their recommendations will go a long way in your matter.

We have Senator Warner here. Before we proceed further, we will take him. They are welcome to stay, but if Senator Heinz and Senator Specter feel they have to go, we will excuse them. We will call you back in a few minutes to answer some questions, Judge Becker.

Senator Warner, please come up with your two appointees. We will be glad to hear from you.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator **Warner**. Senator Thurmond, first I would like to thank you on behalf of the citizens of the Commonwealth of Virginia and some overworked judges who are looking forward with great expectation, assuming that the Senate as a whole confirms these two nominations, to the services of these two outstanding attorneys who are about to be elevated to the bench. We have needed their services for some time. I know that you personally have endeavored to expedite these hearings. I am grateful and express that gratefulness on behalf of all Virginians.

Mr. Chairman, it is an honor to present to the committee President Reagan's nominations for Federal judge in the U.S. District Court in the Eastern District of Virginia, Robert G. Doumar, and for Federal judge in the U.S. District Court in the Western District of Virginia, Jackson L. Kiser.

Bob Doumar is a resident of Norfolk, Va., and a founding partner in the Norfolk law firm of Doumar, Pincus, Knight & Harlan. He is currently president of the Virginia Conference of Local Bar Associations and a member of the Council of the Virginia State Bar.

A 1953 graduate of the University of Virginia Law School, Mr. Doumar was an organizer, drew and signed the original charter, and was the first president of the Tidewater Legal Aid Society. He is a former president of the Norfolk and Portsmouth Bar Association, and, in 1978, was elected a fellow in the International Society of Barristers.

I must say, Mr. Chairman, that I have known Bob Doumar for better than half of my adult life. I started in his law class. I was recalled to active military service and was not able to finish with that class, but Bob Doumar and I sit here today and we recollect the time that we worked in the university cafeteria taking care of the food service and clearing the tables.

We were laughing about the law school librarian. I also worked at night for her. I remember she paid me the exalted salary of 50 cents an hour to put the books back on the shelf between 11 o'clock and midnight in the law school.

I think it is interesting to reflect on the careers of two individuals and how here we are united again, and my having the honor of presenting him to be a Federal judge.

Jack Kiser is a resident of Martinsville, Va. He is a partner in the Martinsville law firm of Young, Kiser, Haskins, Mann, Gregory & Young. He is a permanent member of the Fourth Circuit Judicial Conference, a fellow of the American College of Trial Lawyers, and a member of the American and Virginia Bar Associations.

A 1952 magna cum laude graduate of Washington and Lee University—which incidentally, Mr. Chairman, was my university—Mr. Kiser first practiced law in Galax, Va. He was then appointed an assistant U.S. attorney in 1958. He served in that capacity until 1961 when he began practicing law in Martinsville.

He is a past president of the Martinsville-Henry County Bar Association and a former first lieutenant in the U.S. Army Judge Advocate General Corps, where he was assigned to the defense appellate division in Washington, D.C.

Mr. Chairman, when I made my recommendations to the President of candidates to fill the Federal judgeships in Virginia, I stressed the importance of intelligence, ability to interpret the law, analyze the issues, and make findings. I also stress unquestioned integrity and unsullied honesty.

A judge's dedication to strong law enforcement and careful sentencing is imperative to the administration of criminal justice and the balancing of the interests of our citizens and society facing an evergrowing fear of crime. Mr. Chairman, I assure you that both of these nominees will provide equal justice under the law to all citizens.

In the case of Mr. Doumar, as I have said, I have known him for years. I have observed personally the adherence to those standards and the application of those principles.

On the other hand, I must say, when I began my interviews with candidates and consultations seeking the recommendations of Virginians, I had never met Mr. Kiser. In fact, his nomination today is a tribute to a number of members of the Virginia judiciary, both Federal and State, and a very wide group of bar association officials, practicing attorneys, and civic organizations.

Early in my travels, his outstanding reputation before the bar was brought to my attention by way of recommendations from those persons. These recommendations were strongly reinforced by judges and attorneys throughout Virginia. I then interviewed Mr. Kiser. I determined for myself that he indeed was among the best qualified and deserving of the President's nomination.

It is with great pleasure that I present to the Judiciary Committee Mr. Doumar, President Reagan's nominee for a Federal judgeship in the U.S. District Court, Eastern District of Virginia, and Jackson L. Kiser, President Reagan's nominee for the U.S. District Court, Western District of Virginia.

Thank you, Mr. Chairman, very much.

The **Chairman**. Senator Warner, thank you very much.

I just want to say to these two judges here from Virginia that you have two able Senators from Virginia. They are both held in high esteem by the Members of the Senate. Senator Warner has not been here too many years, but I cannot recall a Senator who has come here for the time he has been here who has exerted more influence for the good of the country than Senator Warner. I congratulate you upon being recommended by this outstanding Senator.

Senator **Warner**. I appreciate your kind remarks.

The **Chairman**. Senator Warner, you are excused now if you wish to leave.

Senator **Warner**. Thank you.

The **Chairman**. If you gentlemen will step back, we will ask Judge Becker to come up for questions.

Judge Becker, please raise your hand. Do you swear that the evidence that you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **Becker**. I do so swear.

The **Chairman**. I met your wife and son. Would you care to introduce them?

Judge **Becker**. Yes, my wife of 24 years, Flora Becker, and my youngest son, Chip Becker. I have three children. Chip is my youngest. He is 11.

The **Chairman**. We are glad to have them with us.

TESTIMONY OF JUDGE EDWARD R. BECKER, NOMINEE, CIRCUIT JUDGE, THIRD CIRCUIT COURT OF APPEALS

The **Chairman**. Judge Becker, in response to the portion of the committee's questionnaire relative to judicial activism, you made this statement:

> The most significant characteristics of the syndrome are those described as a tendency by the judiciary to impose broad affirmative duties upon governments and society, and a tendency by the judiciary to impose itself upon other institutions in the manner of an administration with continuing oversight responsibilities.

Judge, would you please tell us why you consider these two characteristics on the criticism of judicial activism to be so important?

Judge BECKER. Senator, these are the characteristics which when in evidence have the greatest impact upon the political system. They have impact in fiscal terms and they have impact in political terms.

Judges, of course, are part of a nonmajoritarian branch of the Government. It is my view that judges, whenever they are confronted with any kind of institutional surveillance in connection with a suit where a litigant seeks vindication of constitutional or statutory rights, have a duty to exercise the least intrusive alternative. Judges can be very instrusive. I think if they are not careful, notions of separation of powers and notions of comity in our Federal system with deference to State governments can become skewed, and we can lose sight of very important values.

The policy which I have always adopted whenever I have been in that situation is to adopt the least intrusive alternative. Call the parties in, let them work it out themselves, rather than my engaging continuing oversight. A Federal judge can have enormous influence. He is not part of the political system. His job is to adjudicate cases or controversies.

However, when judges do impose broad affirmative duties and supervise them with very detailed equitable decrees, they very often do not know what they are doing. They are not part of the political system. It is best to leave these to the doing of the people who know most about them.

There were three other aspects of judicial activism mentioned in the questionnaire, Senator. One related to class actions. Class actions, of course, have wide use in securities fraud suits. Moreover, if there is a cruise and 300 people get ptomaine on the ship, you want to try that all in 1 case rather than 300 cases. I think the use of representative parties and class action has wide utility in the judiciary. I do not think that can be identified simply with judicial activism.

Then there was the question about the loosening of standing requirements. It is my view, Senator, that the courts are starting to tighten up those standing requirements.

Of the five supposed criteria of judicial activism, the two that I mentioned are, I think, the most significant and the ones which ought to be visited with a heightened sensitivity by all Federal judges.

The CHAIRMAN. I believe the one characteristic you did not mention was a tendency by the judiciary toward problem solution rather than grievance resolution.

Judge BECKER. I do not see too much of that, Senator. I take issue with that. There may be examples of that, but I do not find that to be widespread. To the extent that it is in evidence, I think it really is subsumed under the other two that I mentioned. I think where you see it in evidence are in these kinds of institutional reform cases.

The CHAIRMAN. Judge, what do you feel will be the most rewarding aspect of serving as a circuit court judge rather than in your present capacity in the district court?

Judge **Becker**. Senator, I have enjoyed the district court. I have loved the district court. You are involved with people. You are involved mostly with lawyers but, of course, lawyers are people. There is the excitement of the pit.

However, I think the thing I have enjoyed most is the grappling with the issues and the crafting of opinions. That is what I like the best and that is what you can devote your full time to as a court of appeals judge.

Additionally, there is the collegiality. You are working with two others. There is the interchange of ideas with two other judges on the panel or the entire court en banc. I truly look forward to that.

The **Chairman**. Judge, having served approximately 11 years as a district court judge, do you have any recommendations as to how to speed up the disposition of Federal cases? The courts seem to be bogged down.

Judge **Becker**. Senator, I think the biggest problem in the administration of the business of the Federal trial courts is in the area of complex litigation. Senators Specter and Heinz both mentioned the Japanese Electronics case. That was a case in which I was the seventh judge. That case went on for 11 years. I can tell you that two of the judges on that case died and two went to the court of appeals. I am glad that I am one of those who hopefully will go to the court of appeals.

It was a massive case. The lawyers inspected some 30 million documents. The final pretrial statement was 17,000 pages. These kinds of cases clog the courts.

The solution to these cases in my view is early and active intervention by the judge. The judge cannot let these cases go and build up for a couple of years. The minute one of these cases is filed, I suppose, Senator, there should be judicial activism of a different kind. You have to call the lawyers in very early in the game and lay down the ground rules. You have to stick with the case. You have to meet with them every month, cut out all the nonsense, and focus on the issues.

I think that active and early judicial intervention and constant surveillance and supervision of these massive cases is probably the single most important device for reducing the backlog in the Federal courts.

I think the mine-run cases generally take care of themselves. You have to ride the lawyers. It has been said that if you give lawyers 2 months to do something, they will take 2 months, and, if you give them 2 years to do it, they will do the same thing in 2 years. I do not believe in open season on lawyers, but you do have to have firm control. You have to be kind. You have to be understanding, but if you exercise firm control, you can move the cases along.

I think the problem is not in the run-of-the-mine cases but in the big cases. I think if the Federal judiciary will get involved in these cases early, understand them, get to know them as well as the lawyers and stay with them, we can do a lot to cut down the backlog.

The **Chairman**. I have always felt that in criminal cases it would assist greatly in reducing crime if we had swift apprehension, speedy trials, and certain punishment. Do you agree with that?

Judge **Becker**. Yes, sir.

The CHAIRMAN. I have often felt that maybe if the Federal judges would be a little more strict in bringing these cases to trial and with the defendant attorneys, it would help. When I practiced law, I was a defendant attorney on the criminal side and learned the tricks of the trade. When I became a judge, I would hold their feet to the fire. Do you not think that judges can help greatly in expediting these trials if they would be a little more strict?

Judge BECKER. I think so. In terms of certain punishment, Senator, I do not know whether you are talking about fixed sentences. I do not believe you are talking about a system of fixed sentences. I do not favor a system of fixed sentences. I think there has to be flexibility.

The CHAIRMAN. Some flexibility.

Judge BECKER. Yes, sir.

The CHAIRMAN. I am speaking about pushing these cases to trial and not letting them be put off on a technicality or any other reason.

Judge BECKER. I agree with you.

The CHAIRMAN. And not letting justice go on a technicality. After all, people go into court for justice. No technicality should interfere with justice. I presume you agree with that.

Judge BECKER. I think that is a fair statement.

The CHAIRMAN. Judge, would you give us your views on penalties for second or third time drug dealers? As you know, that is one of the big problems in this country today.

Judge BECKER. The American Bar Association standards contain a presumption of probation for a first offender. In the case of drug dealers, I have far more often than not imposed a sentence of incarceration even on first offenders. I think those cases need to be dealt with sternly.

When you are talking about a second or third offender, that is a matter of gravity. I have imposed long sentences when I have had cases of that kind. I would hope that most Federal judges would do the same. I have of course not seen the statistics.

The CHAIRMAN. Some of these drug dealers feel that they can just pay a big fine, maybe even a million dollars, and get out. Then they will turn around and make 7 million more in the drug business.

Do you not feel like we really need more incarceration for handling drugs? It is such a dangerous thing to our citizens, especially our young people. In my opinion, the people who deal in it should be dealt with in a very strict and harsh manner.

Judge BECKER. I agree with you. In general, I have imposed substantial sentences in those kinds of cases.

The CHAIRMAN. Senator Specter, do you have any questions you would like to propound to the judge?

Senator SPECTER. Thank you very much, Mr. Chairman.

I think I would know the answers to the questions having known Judge Becker as long and as well as I have. Therefore, I have no questions.

The CHAIRMAN. Thank you.

Senator Specter is a member of this committee. He will have a chance to vote on your nomination when it comes up. I assure you there will be two of us who will vote for you. We are glad to have you with us here today.

Judge BECKER. Thank you very much, Senator.

The CHAIRMAN. I am sure there will be no trouble about your nomination. Good luck to you.

Judge BECKER. Thank you.

The CHAIRMAN. You may be excused now.

We will now ask the Virginia judges to come forward.

Please raise your hands to be sworn.

Do you solemnly swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. DOUMAR. I do.

Mr. KISER. I do.

TESTIMONY OF ROBERT G. DOUMAR, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF VIRGINIA

The CHAIRMAN. Mr. Doumar, how would you handle an instance in which counsel for one of the parties in your court was obviously not a skilled litigator or was not prepared adequately to represent the interests of his or her client?

Mr. DOUMAR. Senator, if the matter arose, I think the first thing I would do would be to continue the matter and request the attorney come to chambers. I would suggest to the attorney that he should associate other counsel who are more skilled in the matter so that substantial justice could be accorded to the party.

The CHAIRMAN. Mr. Doumar, do you think it is necessary for attorneys to receive specialized training before being allowed to practice in the Federal courts?

Mr. DOUMAR. Senator, I felt that it was not necessary to receive specialized training. When I was a young lawyer, I felt strongly that in Federal court they did not pay the attorneys to defend indigent defendants. I felt that the young lawyers there who were relatively inexperienced—I had the opportunity to appear there—gave to the courts increased enthusiasm, and by their increased efforts, they accorded to defendants defenses which made up for their lack of experience in their efforts.

On the contrary, I felt that in some instances in the State courts, which then paid people to defend indigents, there was a tendency on the part of some to accord to defendants the time and effort that the money would pay them.

There are offsetting considerations there. I do think that in a serious case, however, if you are talking about criminal defendants, that an experienced litigator should be assigned with a young person who may be inexperienced.

The CHAIRMAN. If a lawyer knows the rules in the Federal court—there should not be any question about that if he has had experience in the State court—there should not be a problem of trying a case in the Federal court, should there?

Mr. DOUMAR. No, sir.

The CHAIRMAN. In fact, I found it really simpler to try a case in the Federal court.

Mr. DOUMAR. I do not know if it is simpler.

The CHAIRMAN. You get a quicker trial.

Mr. DOUMAR. I felt you were able to receive certainly a quicker trial, as you expressed it, Senator, and, in our area, a more positive trial, a trial that is more certain of trial. There would be less of a tendency to postpone or put off.

The CHAIRMAN. Mr. Doumar, would you please briefly tell the committee how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern?

Mr. DOUMAR. Senator, I am involved in some corporations which I would of course dissolve after the first of the year. I have discussed it with some of the stockholders in those small corporations. I hope to dispose of my holdings that were less than 100 shares of stock in certain corporations. I would of course not sit in any case in which I or any member of my family had a direct or indirect interest of any kind. I would insure that there would not be even a taint of a question of conflict in any case in which I might participate.

The CHAIRMAN. Mr. Doumar, I have witnessed some judges, including some Federal judges, who were actually discourteous to lawyers, jurors, and the public. I have heard some of them yell out in the courtroom, complete indecorum in the courtroom. I consider judicial temperament to be a prerequisite for a Federal judge. Would you please give me your thoughts on this subject?

Mr. DOUMAR. I would certainly agree with you in every respect, Senator. I think it is absolutely essential that a judge exert patience and understanding and listen to the arguments of each side thoroughly and completely in order that even were he convinced prior to hearing the arguments that a certain rule of law might be applied he would be able to accord to the lawyers a sufficient time so that he could learn perhaps why he was in error and why he should change his mind. I think it is absolutely essential to thoroughly listen to every argument which any lawyer reasonably makes on behalf of his client.

The CHAIRMAN. There may be some additional questions that some member of the committee may wish to propound. If so, you will be given an opportunity to answer them. I do not think I have anything else at the moment.

From all that we know about you, I feel certain you will be confirmed by the Senate. We wish you success in your work.

Mr. DOUMAR. Thank you, sir.

The CHAIRMAN. Do you have any family here that you would like to introduce?

Mr. DOUMAR. No, sir.

The CHAIRMAN. You are now excused.

Mr. DOUMAR. Thank you, sir.

TESTIMONY OF JACKSON L. KISER, NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF VIRGINIA

The CHAIRMAN. Mr. Kiser, we are glad to have you with us.

I believe you served 2 years as U.S. Commissioner and 3 years as assistant U.S. attorney in Virginia.

Mr. KISER. That is correct, sir.

The **Chairman**. Do you think this experience will help you in performing the duties of a district judge? If so, how?

Mr. **Kiser**. I do not really think being a U.S. Commissioner will be that much help. I did not get that much business. I set a few bonds and tried a few traffic cases on the Blue Ridge Parkway. That was some time ago.

I do think having been an assistant U.S. attorney gives me the perspective of having been a prosecutor. For the last 20 years, I have been a defense attorney. I think I have seen the criminal case from both perspectives.

Obviously, in being a judge, I think it would be helpful to know the problems that arise in prosecuting a case as well as the problems that arise in defending one. From that standpoint, I think my tenure in the U.S. attorney's office will help.

The **Chairman**. Mr. Kiser, the committee is aware that there are serious problems in some prisons, particularly from the standpoint of overcrowding and effective rehabilitation. What recommendations, if any, can you offer regarding prison reform?

Mr. **Kiser**. Mr. Chairman, I am afraid I would have to disclaim any expertise in it other than any other citizen might have. I have seen it from the Virginia standpoint. I know that our local jails are overflowing because the State prison system cannot handle those felons who have been committed to the State prison system. From that standpoint there is a lot of consternation both at the State level and the local level. As always, it is a money problem.

Personally, I would like to see more camp type prisons built for the nonviolent type prisoners where we do not go to the very expensive maximum security prisons. I think that approach would be helpful. I do not know what other sort of approach you could take as long as they are going to be incarcerated. We have the release-time approach in Virginia. We have various work programs. That has helped some, but it certainly has not answered the problem.

The **Chairman**. Mr. Kiser, do you think it should be mandatory for sitting Federal judges to have some form of continuing legal education? Some States now require this, including my home State of South Carolina.

Mr. **Kiser**. Whether it should be mandatory or not, Mr. Chairman, I really have not thought that maybe it would have to be. I would hope that a Federal judge would be conscientious enough to do his own study and education and would take advantage of programs that were offered like those offered by the Federal Judicial Center.

Maybe I do not know enough about the problem, but I feel that it really is a pretty sorry state of affairs if a Federal judge has to be coerced into keeping up with the law. Then you have a pretty sorry product to start with.

The **Chairman**. Mr. Kiser, would you give the committee your views on judicial activism?

Mr. **Kiser**. I have, of course, written them in the questionnaire. As I indicated, I think the criticism is well taken. My view is that judges are to decide issues between litigants, to resolve problems between man and man and man and Government, and a case should not be seized upon as a vehicle to promote some special interest cause.

Obviously, sometimes a cause gets involved in litigation, but that certainly should not be the primary purpose. I think the criticism is a valid one. As I say, in my law practice I have always tried to represent people and not causes. I think that is the way the courts should look at the litigants, that these people have a problem and they have come to the court to have it resolved. That should be the primary object of the court. I am afraid I do not have the wealth of experience to speak to the problem as did the first candidate.

The CHAIRMAN. Do you feel that it is the duty of the Congress to make the law and make policy and the judiciary be limited to interpreting the law?

Mr. KISER. Very definitely, sir. I think a judge's job is to interpret the law. It is the job of the legislative body, be it the State legislature or the U.S. Congress, to set the policy of the country with the only restraints being that of the Constitution of the United States or the respective State.

The CHAIRMAN. Do you feel it is proper for the judiciary to go into a field of jurisdiction that has never been delegated to the central Government, the Union, in the Constitution, or in some amendment since the adoption of the Constitution?

Mr. KISER. No, sir. I think the Federal court is one of limited jurisdiction, except insofar as a particular problem or a particular issue may impinge upon constitutional rights. I realize that is a broad statement. I believe that this body, the U.S. Congress, can set the parameters of the Federal courts' jurisdiction and the Federal courts should abide by them.

The CHAIRMAN. Do you feel that if the Congress fails to act in some field of jurisdiction that the judiciary ought to go into it if a vacuum is created, or should it wait and leave that to the Congress?

Mr. KISER. I think if a vacuum is there, then it should be commended to the Congress to act on it.

The CHAIRMAN. The committee has received a letter from Arthur L. Tracy of Danville, Va., this afternoon. We just received it. It says he wants to testify. Of course the committee did not have time to notify him to be here if he wanted to testify. However, he will be notified if he wishes to make any statement for the record that we will receive it.

Do you have anything else to say?

Mr. KISER. No, sir.

The CHAIRMAN. We wish you success and happiness in your new work. I do not know of anyone who can perform a finer duty than a trial judge. It is one of the nicest jobs I ever had. Most cases are not appealed. What you decide will determine the justice that people get. A trial judge has a tremendous responsibility. I am sure you will appreciate that as you undertake your duties.

Mr. KISER. Yes, sir. I am looking forward to it.

The CHAIRMAN. Good luck to you. I am sure the Senate will see fit to confirm you.

Mr. KISER. Thank you, sir.

The CHAIRMAN. The committee stands adjourned.

[Whereupon, at 3:05 p.m., the committee recessed, to reconvene at the call of the Chair.]

BIOGRAPHIES

EDWARD R. BECKER

NOMINEE, U.S. CIRCUIT JUDGE, THIRD CIRCUIT COURT OF APPEALS

Birth: May 4, 1933, Philadelphia, Pa.

Legal residence: Pennsylvania.

Marital status: Married to Flora Lyman Becker, three children.

Education: 1950-54—University of Pennsylvania, B.A. degree; 1954-57—Yale Law School, LL.B. degree.

Bar: 1958—Pennsylvania.

Experience: 1957-61—private practice in association with Herman Becker (father); 1961-70—partner, Becker, Becker & Fryman, Philadelphia, Pa.; 1970 to present—U.S. district judge, Eastern District of Pennsylvania.

ROBERT G. DOUMAR

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF VIRGINIA

Birth: February 17, 1930, Norfolk, Va.

Legal residence: Virginia.

Marital status: Married to Dorothy Mundy Doumar, two children.

Education: 1947-51—University of Virginia, B.A. degree; 1951-53—University of Virginia Law School, LL.B. degree.

Bar: 1952—Virginia.

Military service: 1953-55—United States Army.

Experience: 1955-58—Venable, Parsons, Kyle & Hylton, Associate; 1958-present—Doumar, Pincus, Knight & Harlan, Partner (law firm formerly Doumar, Pincus & Anderson).

JACKSON L. KISER

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF VIRGINIA

Birth: June 24, 1929, Welch, W. Va.

Legal residence: Virginia.

Marital status: Married to Carole Gorman Kiser, three children.

Education: 1946-49—Concord College, B.A. degree in 1951; 1949-52—Washington & Lee University, LL.B. degree.

Bar: 1951—Virginia.

Military service: 1952-55—U.S. Army.

Experience: 1955-58—Sole practitioner, Galax, Va.; 1956-58—U.S. Commissioner, Western District of Virginia; 1958-61—assistant U.S. attorney, Western District of Virginia; 1961-present—Young, Kiser, Haskins, Mann, Gregory & Young, P.C., Martinsville, Va. (firm has had various names).

CONFIRMATION HEARING ON:

ALVIN I. KRENZLER, RALPH K. WINTER, JR., SAM A. CROW, J. OWEN FORRESTER, ISRAEL LEO GLASSER, AND JOHN C. SHABAZ

FRIDAY, DECEMBER 4, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 11:30 a.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond [chairman of the committee] presiding.

Also present: Senators Dole and Metzenbaum.

Staff present: Vinton DeVane Lide, chief counsel; Duke Short, chief investigator; and Pamela Swanner, clerk.

NOMINATION OF ALVIN I. KRENZLER, RALPH K. WINTER, JR., SAM A. CROW, J. OWEN FORRESTER, ISRAEL LEO GLASSER, AND JOHN C. SHABAZ

The **CHAIRMAN.** I am pleased to have before the committee Ralph K. Winter, Jr., of Connecticut, to be circuit judge for the Second Circuit Court of Appeals; Judge Sam A. Crow, of Kansas, to be U.S. district judge for the District of Kansas; Judge J. Owen Forrester, of Georgia, to be U.S. district judge for the Northern District of Georgia; Judge Alvin I. Krenzler, of Ohio, to be U.S. district judge for the Northern District of Ohio; Israel Leo Glasser, of New York, to be U.S. district judge for the Eastern District of New York; and John C. Shabaz, of Wisconsin, to be U.S. district judge for the Western District of Wisconsin.

Now we are going to hear from the Senators first because they are extremely busy, and then we will hear from the nominees and question them individually.

First at the witness table we have the two U.S. Senators from Ohio. We will be pleased to hear from the senior Senator and then the junior Senator from Ohio.

STATEMENT OF HON. JOHN GLENN, A U.S. SENATOR FROM THE STATE OF OHIO

Senator **GLENN.** Thank you very much, Mr. Chairman. I appreciate your letting us on early because we have other duties, as you correctly pointed out. The Senate is in a very busy time period now.

It is always an honor and a privilege to appear before the Judiciary Committee, Mr. Chairman. I am especially pleased to be here this morning to join in introducing Alvin I. Krenzler to you and the other members of the committee.

Judge Krenzler, who is far better known back home as "Buddy" to his many friends in Beachwood, Ohio, and the northern Ohio area, has very long been active in the affairs of his community, his State, and his Nation. I do not say that lightly.

More important to the question at hand, he also has built a very outstanding record as a judge and as an attorney. I very strongly support his nomination by President Reagan to serve on the United States District Court for the Northern District of Ohio.

He has served some 12 years on the bench, leading up to our present time period. In 1968 to 1970 he served 2 years on the court of common pleas, and over the past 10 years Buddy has served with distinction on the State Court of Appeals for Ohio's Eighth District.

The fact that he has been elected and reelected to that post three times is ample testament to the esteem in which his abilities are held by the people of the greater Cleveland area. I know he will continue this fine record of judicial service at the Federal level.

Judge Krenzler is a graduate of Western Reserve University in Cleveland and received his legal education there and at Georgetown University Law Center here in Washington, where he did graduate work and he received an advanced degree from Georgetown Law Center.

He was a naval aviator during World War II, so he cannot be all bad, Mr. Chairman, and has had extensive legal experience both as an attorney and in various government positions. He has been a trial attorney for the Internal Revenue Service, assistant attorney general for the State of Ohio, and judge of the Cuyahoga County Court of Common Pleas.

Judge Krenzler has also found time to involve himself in the affairs of his community. He serves on numerous boards, as a very lengthy list which I am sure the committee already has, will attest to. He has been particularly active in working on behalf of the mentally retarded.

For his many accomplishments in this and other areas Buddy was voted "Man of the Year" in 1969 by the Beachwood, Ohio, Civic Club.

One of my very close friends is also with us today, Mr. Chairman. Ambassador Milt Wolf is here this morning, a close friend of Buddy Krenzler. We were just discussing this nomination in my office a few moments ago before we came to the hearing this morning. Milt was reaffirming once again that he thinks this is one of the finest appointments that the President could possibly make to this position. We are glad to bring his recommendation to this committee also.

Mr. Chairman, Buddy Krenzler is an honorable man who has served his country well in the past and will in the future. Equally important, he is someone who cares deeply about his fellow human beings, particularly those whose lives have been less fortunate. I believe he will be a splendid Federal judge. I urge the committee to swiftly confirm his nomination.

Thank you.

The **Chairman**. Thank you very much, Senator, for your presence here.

Now we have a distinguished member of this committee, Senator Metzenbaum, from Ohio.

STATEMENT OF HON. HOWARD METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator **Metzenbaum**. Thank you, Mr. Chairman.

I am very pleased and privileged to be here to speak in support of the nomination of Alvin "Buddy" Krenzler to the U.S. District Court for the Northern District of Ohio.

Buddy Krenzler is an unusual individual. Maybe part of the reason for his being an unusual individual is the great family that he has. I would like to take this opportunity to introduce them to you. Whenever you see Buddy Krenzler, you see his wife, Adeline, who is back there somewhere.

Would you stand up, please, Adeline?

Their children are Robin, Debbie, Gary, as well as Roger, his son-in-law.

The **Chairman**. We are glad to have the members of his family here.

Senator **Metzenbaum**. As Senator Glenn already has pointed out, we also have Ambassador Wolf here.

Because I thought the chairman would be particularly interested, there is another special friend of Judge Krenzler who is here, not quite as close a friend of mine, the Republican County chairman for Cuyahoga County, Bob Hughes.

Why don't you stand up?

He is a little closer to you, Strom, and to you, Bob, than to me. [Laughter.]

Buddy Krenzler is, indeed, a rare individual because some people find the time to practice law, to be jurists, and other people find the time to be great community activists. Buddy Krenzler is that kind of individual. He has been head of the Cuyahoga County Mental Retardation Board and has indicated a tremendous leadership ability in the whole field of mental retardation. He really is probably Cleveland's leading citizen in that area.

He has been part of the teaching group of the Ohio Judicial College which provides a teaching opportunity for the jurists who are in Ohio, whether they are at the municipal, county, or appellate court level.

He has been a trustee, and an outstanding one, of one of our universities in Cleveland as well as another one in Ohio, Hiram University. He has been on the board of Mt. Sinai Hospital.

He is, indeed, a rare individual. As a matter of fact, he is particularly rare because he is member of the Republican party but I have yet to attend a Democratic function where Buddy Krenzler has not been present. It attests to the wide support that he has in the community—Democrats, Republicans, concerned citizens, people from all branches of the community.

I think he will make an extremely able jurist, and I am very pleased to be here to recommend his nomination to you.

The CHAIRMAN. Thank you very much, Senator. We are glad to have you here. Of course, you are a member of the committee, so you are supposed to be here, anyway. [Laughter.]

I will excuse you, gentlemen, for the moment.

Our highest nominee here today is a circuit judge from Connecticut. Mr. Winter has Senator Weicker here with him.

Senator Weicker, will you come forward and introduce Mr. Winter?

STATEMENT OF HON. LOWELL WEICKER, JR., A U.S. SENATOR FROM THE STATE OF CONNECTICUT

Senator WEICKER. Thank you very much, Mr. Chairman.

I am pleased today to introduce to the committee Ralph K. Winter, Jr., of Woodbridge, Conn., who has been nominated by the President to be U.S. circuit judge for the second circuit.

Professor Winter is exceptionally well-qualified for this prestigious appointment. He is a graduate of Yale University and Yale Law School. He went to the right university, but I am not so sure he went to the right law school. I went to the University of Virginia Law School.

He has clerked for the Hon. Caleb Wright, the U.S. district judge for the District of Delaware, and for Hon. Thurgood Marshall, then U.S. circuit judge for the Second Circuit Court.

Since 1961, he has distinguished himself on the faculty of the Yale Law School. In 1978, he was named the William K. Townsend Professor of Law. He has also served as senior fellow of the Brookings Institute, and since 1972 as adjunct scholar at the American Enterprise Institute.

I have to find out, Ralph, how you do this, quite frankly. Between Brookings and the American Enterprise Institute, I think you have covered most of the bases.

He has authored numerous articles and publications on varied legal topics, with emphasis on labor and constitutional law. In addition to his educational activities, Professor Winter has participated extensively in litigation before State and Federal courts, including arguing as lead counsel on a 1975 case on campaign law before the Supreme Court.

I very enthusiastically support this nomination. I confess it was not one of my origins, but rather one that came to me via the administration. But procedure aside, I think the administration has an outstanding individual as its nominee.

Among those to whom I talked in Connecticut who know Ralph Winter, they respect his intellectual capacities and also the very warm traits that apply to him as a human being.

I would hope that he would get favorable consideration, Mr. Chairman, from your committee; that that consideration would be prompt; and that Ralph would go to the bench at the earliest possible moment. The bench needs him.

Again, I congratulate the administration for its choice.

The CHAIRMAN. Senator, thank you for your presence. Your endorsement of Professor Winter is of course extremely important. I congratulate him for having the fine support of an able Senator such as you.

Senator **Weicker**. Thank you very much, Mr. Chairman.

The **Chairman**. Senator Dole, you can sit here or at the witness table. You are entitled to sit either place.

Senator Dole is a distinguished member of this committee and also chairman of the Senate Finance Committee.

Is Senator Kassebaum going to be here?

Senator **Dole**. Senator Kassebaum is in a meeting. She is not going to be able to make it, but I would like to have her statement to be made part of the record, Mr. Chairman.

The **Chairman**. Without objection, Senator Kassebaum's statement will be included in the record following your statement.

STATEMENT OF HON. BOB DOLE, A U.S. SENATOR FROM THE STATE OF KANSAS

Senator **Dole**. I am very pleased to be here. There seem to be a lot of happy people in the room this morning, and I am proud to have Sam Crow among that group.

I must say, Mr. Chairman, that I have a written statement which I would like to have made part of the record.

The **Chairman**. Without objection, your full statement will be placed in the record following your presentation. If you care to say anything else, feel free to do so.

Senator **Dole**. This is a real opportunity and an honor for me because Sam Crow and I have been friends for a long, long time. We were in the same law school class. In law school he did very well and I survived, so I went into politics and he went into hard work being a lawyer.

He has been an outstanding man throughout his lifetime. He and his wife, Ruthie, and his two sons are an outstanding family.

I think, Mr. Chairman, that he is the kind of man who will bring a great amount of respect to the judiciary because, whatever Sam Crow has done, he has done it on his own. There was no one there to take care of him. He did it the hard way.

I just think it is an opportunity not only for Sam Crow, and an honor for Senator Kassebaum and me to present him to this committee, but I think it is going to bring great honor to our State and to those who will be associated with Judge Crow.

Sam, maybe I will not be here for the hard questions that Senator Thurmond is going to ask, but I am very proud to present you to the committee. We will do all we can to expedite the hearing process and, hopefully, have you confirmed very soon.

Did you hear all that statement, Mr. Chairman?

The **Chairman**. Yes, I heard it all.

Senator **Dole**. I am just telling you what a good man he is.

The **Chairman**. I heard you say previously what a good man he is, so I expected you to say what you did.

Senator **Dole**. We are long-time friends.

The **Chairman**. We are delighted. I just want to say to Judge Crow that it is fortunate to have the endorsement of such an able and distinguished Senator as Bob Dole. Senator Kassebaum, I understand, also endorses you, too, who is also a very fine Senator.

Senator **Dole**. Thank you.

The **Chairman**. Thank you very much. You are excused.

[The prepared statements of Senator Dole and Senator Kassebaum follow:]

STATEMENT OF SENATOR BOB DOLE

Mr. Chairman, Senator Kassebaum and I take great pleasure today in introducing Judge Sam A. Crow, who has been nominated to be a United States District Judge for the District of Kansas.

A native of Kansas, Judge Crow received his law degree from Washburn University School of Law in Topeka in 1952. In 1953, he enterred the law partnership of Rooney, Dickinson, and Prager, and subsequently became the senior partner of that firm. During his long and highly successful career in private practice, Judge Crow handled cases in a wide range of legal areas. Much of his practice involved the trial of civil and criminal matters, and he became well known among colleagues and judges for his excellent litigation skills.

Since 1975, Judge Crow has been a U.S. magistrate for the District of Kansas. District court judges in Kansas have relied heavily on Judge Crow's expertise and exceptional capabilities and have delegated to him the widest range of responsibilities allowed by Federal Law. During the Carter Administration, the Federal Nominations Commission also recognized Judge Crow's superior abilities by selecting him as one of three candidates for a previous judicial vacancy on the Kansas Federal District Court.

Judge Crow is eminently qualified for this judgeship and he has my strongest support. He will bring to the bench years of experience and demonstrated success as both a trial lawyer and judge. His appointment will greatly benefit both the people of Kansas and the Federal Judiciary. I look forward to the Judiciary Committee's expeditious approval of his nomination.

STATEMENT OF SENATOR NANCY LANDON KASSEBAUM

Mr. Chairman, I am pleased to have the opportunity to join with Senator Dole in recommending a fellow Kansan, Judge Sam Crow, for appointment to the federal bench for the District of Kansas.

Judge Crow brings to this position a long an distinguished career as a practicing attorney and a jurist. In the more than 20 years that he spent as a practicing attorney in Topeka, Kansas, Judge Crow has acquired a board range of expertise in civil and criminal matters. While specializing in trial practice, he demonstrated his unique abilities as a skilled litigator, and he has received the highest rating from his peers for his legal ability and competence.

Judge Crow's initial judicial experience came as a military trial judge. Having served in active duty during World War II and the Korean War, he remains a reserve officer and one of a select group of Army reserve officers assigned to the trial judiciary.

For the past five years, Judge Crow has served as U.S. Magistrate for the District of Kansas. This position has provided him with invaluable exposure to federal substantive and procedural laws. During this time, he has proved himself to be an able jurist with the requisite judicial temperament. He has inspired the confidence of the Kansas federal judges who unanimously certified him to try federal civil cases.

Mr. Chairman, I am satisfied that Judge Crow possesses the necessary legal skills, experience, and integrity to be an outstanding federal district court judge. I fully support his nomination and ask the Committee to act swiftly to approve his nomination.

The CHAIRMAN. Senator Mattingly is next, I believe.

Senator Mattingly, please come forward.

You may proceed, Senator.

STATEMENT OF HON. MACK MATTINGLY, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator MATTINGLY. Thank you, Mr. Chairman.

I would like to express to you what a great pleasure it is for me to appear before your committee today for the purpose of introducing and recommending future judge Owen Forrester to the Federal bench. His background is quite distinguished.

He has served as an assistant U.S. district attorney in Georgia. He has also served as a special attorney in charge of drug abuse law enforcement. At one time he also was the assistant U.S. attorney in the Northern District of Georgia. From 1966 forward, he has been the U.S. magistrate for the Northern District of Georgia.

He has participated in many activities. He was part of the Leadership Atlanta, which is an outstanding group. He has been an instructor in trial techniques at the Attorney General's Institute on Trial Advocacy. He has been a guest lecturer. He, like many other attorneys, has also had several publications, besides belonging, I assume, to all the bar associations.

Owen and his wife, Linda, and his two sons are here today.

I am very proud to present him. I am also very proud by the way he was selected, because he was selected based upon his prior outstanding work in the State of Georgia and across this country. He was selected by a judicial review committee in Georgia which was formed earlier this year.

He is going to replace another outstanding judge who has decided to take senior status.

Senator Thurmond, I appreciate this opportunity to come before you. I recommend an expeditious approval of Judge Forrester. I will not say anything about the University of Georgia and Clemson.

The CHAIRMAN. Well, you know what happened—Clemson beat the University of Georgia. [Laughter.]

I have a high regard for the University of Georgia, though, because they now rank second to Clemson. [Laughter.]

Senator MATTINGLY. But, sir, it is not January 1 yet. [Laughter.]

Thank you.

The CHAIRMAN. It is a pleasure to have you here, Senator.

I congratulate Judge Forrester for having the backing of a distinguished Senator from Georgia, Senator Mattingly. He is a new but very able Senator. He has established himself here as a very dedicated, fine man.

Senator Nunn, did you wish to speak on behalf of this nominee, too?

STATEMENT OF HON. SAM NUNN, A U.S. SENATOR FROM THE STATE OF GEORGIA

Senator NUNN. Mr. Chairman, thank you very much. I will put my whole statement in the record. I know you have a long agenda.

I endorse the nomination because I think Judge Forrester has the background, he has the experience, and he has the respect to do a superb job. I would join my colleague, Senator Mattingly, in supporting this nomination and urge that he be confirmed.

The CHAIRMAN. Without objection, your statement will go in the record endorsing him.

We thank you for coming.

Senator Nunn is a very able Senator here in the Senate. You are to be congratulated on having the backing of both these able, fine Senators.

You are now excused.

[The prepared statement of Senator Nunn follows:]

Prepared Statement of Senator Sam Nunn

Mr. Chairman and distinguished members of the committee, it is a distinct pleasure for me to appear before you this morning to introduce President Reagan's nominee for service as a District Court Judge for the Northern District of Georgia, Judge J. Owen Forrester.

I am honored to introduce this distinguished gentleman and endorse his nomination for I have complete confidence that he possesses a combination of legal talent and experience that ensures that he will continue to be a credit to our federal judiciary.

After 2 two years working as an associate in one of the city of Atlanta's finest labor law firms, Owen Forrester began his service for the United States District Court in the Northern District of Georgia in 1969 as an Assistant United States Attorney, where he received a Justice Department outstanding performance award in 1972. After serving as the Special attorney in charge of the Department of Justice's Office for Drug Abuse Law Enforcement in Atlanta, Owen Forrester returned to the United States Attorney's Office as First Assistant U.S. Attorney for the Northern District of Georgia in 1973. In 1976, Judge Forrester was selected by the Judges of the Northern District Court to serve as a United States Magistrate.

Mr. Chairman, I believe that Judge Forrester's extensive experience and service in the Northern District of Georgia, his demonstrated command of the law, and his practiced judicial temperament as a Magistrate unquestionably qualify him for service on the federal bench.

A native of Columbus, Georgia, Judge Forrester obtained his undergraduate education at the Georgia Institute of Technology and earned his J.D. Degree from my Alma Mater, the Emory University School of Law. He is a member of the Georgia and Atlanta Bar Association and an active member of the Atlanta Lawyers Club. Judge Forrester has shared his extensive legal experience with other members of his profession by serving as a guest lecturer at Emory Law School and the Georgia Police Academy as well as an instructor in trial techniques at the Attorney General's institute on trial advocacy.

Mr. Chairman, I am confident that Judge Forrester will prove an invaluable addition to the Northern District Court, and I sincerely urge the members of this Committee and my colleagues in the Senate to support his confirmation.

The CHAIRMAN. We will take the Senators from New York and their nominee.

We will be delighted to hear from you, gentlemen. Who nominated this man? I guess I will take him first. If neither one of you did but a panel did, I will take the senior Senator first.

Senator D'AMATO. I must confess, Mr. Chairman, that I wish I could claim that our panel first recommended Judge Glasser, but the senior Senator from New York must claim that distinction, and I am delighted to join with him.

The CHAIRMAN. The senior Senator from New York is now recognized.

STATEMENT OF HON. DANIEL PATRICK MOYNIHAN, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator MOYNIHAN. Thank you, Mr. Chairman.

May I say to my distinguished colleague and friend that our panel was the first to nominate Dean Glasser simply because we were there first. I think you would have done the same.

Mr. Chairman, it is an honor and a privilege to present to this honorable committee Dean Israel Leo Glasser of the Brooklyn Law School, which we had heard was second to Clemson but that may not be so.

The CHAIRMAN. Clemson does not have a north school, Senator. [Laughter.]

Senator MOYNIHAN. Dean Glasser has presided over this important legal institution in New York for almost two decades now as professor of law and dean of the faculty. Prior to that he was for a decade a judge of the family court of the State of New York. He is a distinguished jurist, a scholar of great achievement in his field, and we commend him to you, sir, as a man who will carry on the traditions of the Federal judiciary as you would wish them done.

The CHAIRMAN. Thank you very much. We are very pleased to have you with us, Senator.

We will now hear from the junior Senator of New York.

STATEMENT OF HON. ALFONSE M. D'AMATO, A U.S. SENATOR FROM THE STATE OF NEW YORK

Senator D'AMATO. Thank you very much, Mr. Chairman. It is always a pleasure to be here before you and this committee.

Today it is a great pleasure for me to join with the senior Senator of New York, Senator Moynihan, whose committee unanimously recommended Dean Leo Glasser. Might I add my committee was enthusiastic in its support of this outstanding candidate.

Dean Glasser was a distinguished jurist. He is a prodigious worker. He is a man of depth, of understanding, and indeed compassion. He brings these rare qualities that have been embodied in the legal system for 20 years plus.

I am delighted to join with Senator Moynihan in urging Dean Glasser's speedy confirmation because, indeed, he will be a great asset to our court system. Particular note is the fact that he will be serving in the eastern district, which is a district that has a tremendous caseload, a tremendous volume. I know that his expertise and his work are sorely needed in that area.

I am delighted to be here and to indicate to this committee my strong support of Dean Glasser for the position of Federal district judge.

The CHAIRMAN. Thank you very much.

Senator D'Amato is a new Senator here, but he has established a reputation for ability, character, and dedication. His words and his actions, I am sure, carry very much with you.

Your senior Senator has been here for a number of years. He was formerly an ambassador, but he found he liked the Senate better. We are glad to have him here.

New York has two able, fine Senators. I congratulate you, Mr. Glasser, for having their support.

You are now excused.

Senator MOYNIHAN. Thank you, Mr. Chairman.

Senator D'AMATO. Thank you, Mr. Chairman.

[The prepared statement of Senator D'Amato follows:]

PREPARED STATEMENT OF SENATOR ALFONSE M. D'AMATO

Mr. Chairman, it is a pleasure to me to join with my colleague, Senator Moynihan, to recommend Dean Glasser to fill a vacancy on the United States District Court for the Eastern District of New York.

Dean Glasser will bring a combination of important qualities to the court. He is a respected legal scholar whose work is universally recognized among his peers. Dean Glasser has devoted much of his professional career to his alma mater, Brooklyn Law School, where he rose to a professor of law and dean of this great institution. He interrupted his scholarly career to serve as a family court judge for some eight years, thus adding direct experience with the law to his distinguished academic background.

Dean Glasser brings other essential qualities to the bench. He is a warm, compassionate and sensitive human being. He is a diligent and prodigious worker. Such a rare combination of academic accomplishment, experience, and judicial temperment make him a natural choice for this important judicial position.

That's why my judicial screening committee unanimously recommended that Dean Glasser become Judge Glasser. I am proud to join with Senator Moynihan and his screening committee in endorsing this eminently qualified man for the Eastern District Federal Judgeship.

The CHAIRMAN. Now we have the Senator from Wisconsin.

Senator Kasten, will you come up?

Is Senator Proxmire here?

Senator Kasten, if you will speak first inasmuch as Mr. Shabaz is your nominee, I believe, and then you will be followed by Senator Proxmire.

STATEMENT OF HON. ROBERT KASTEN, JR., A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator KASTEN. Mr. Chairman, I am pleased to have this opportunity to introduce you to John Shabaz, whom President Reagan has nominated to fill the current vacancy in the Western District in Wisconsin.

I have known and respected John for many years. We served together in the Wisconsin Legislature, and I have had a chance over the years to watch carefully his contribution to State government in Wisconsin and also the outstanding public service he has provided.

Wisconsin legislators serve on a part-time basis, and Mr. Shabaz has maintained an active general law practice, including a good deal of trial work in West Allis, a Milwaukee suburb.

I am particularly pleased that President Reagan has accepted my recommendation and has nominated John Shabaz to fill this vacancy on the Federal bench.

For many years, Mr. Shabaz has been thoroughly exposed not only to the interpretation of the law, but also to the formulation of the law. He is an effective, articulate lawyer and a legislator, and I know that he will perform most effectively on the bench. He is, in addition, Mr. Chairman, an individual of high integrity.

Many share my view. Mr. Shabaz has not only been recommended by Republican Party officials in Wisconsin, but is also the unanimous choice of the Republicans in our congressional delegation. He has the support of Wisconsin Governor Lee Dreyfus as well as every Republican in the Wisconsin State Assembly and all but one Republican in the Wisconsin State Senate.

A number of sitting circuit judges in Wisconsin have written to me and also to the President on John Shabaz' behalf. The ABA carefully reviewed his qualifications and its standing committee on the judiciary unanimously found him qualified to assume this position.

Mr. Chairman, I also have a letter from Judge Bruce Beilfuss, who is the highest ranking judge in the State of Wisconsin. I believe that letter was delivered to you possibly this morning. I would like that letter to be included in the record.

The CHAIRMAN. Without objection, the letter from the chief justice of the State of Wisconsin will be placed in the record.

[The letter referred to above follows:]

STATE OF WISCONSIN,
SUPREME COURT,
Madison, Wis., December 3, 1981.

Hon. STROM THURMOND,
Chairman, Senate Juciciary Committee,
Washington, D.C.

DEAR SENATOR THURMOND:

I have been asked to give you my evaluation of the qualifications of Mr. John Shabaz, who seeks the position of Federal District Judge for the Western District of Wisconsin.

I have known Mr. Shabaz as a lawyer for about 17-18 years. He has been an active practitioner, perhaps not exclusively, but extensively during that period of time, principally in the Milwaukee-Waukesha area. I have not observed him in a trial court, but I have done so first-hand in our Supreme Court on several occasions. His briefs were good, much better than average. His personal appearance and his oral arguments were excellent. He demonstrated a very good aptitude and knowledge of law. His demeanor and forensic ability are outstanding.

It is my personal belief that Mr. Shabaz will make an outstanding federal district judge. His aptitude and experience in law, together with his reputation for hard work, his pleasant personality, and what I believe to be a good temperament, will well qualify him for this position. I further believe there can be no question about his integrity, his fairness, and his ability to apply the law to facts as they develop in an evenhanded manner without preconceived or personal conceptions.

I recommend the nomination and confirmation of John Shabaz as Federal District Judge for the Western District of Wisconsin.

Sincerely,

BRUCE F. BEILFUSS.

Senator **KASTEN**. Mr. Chairman, in asking you to support this nominee, I want you and the members of the committee to be aware of the confusion that surrounded recommendations that were made to Senator Proxmire and myself by a merit selection panel which we appointed.

Evidently what happened was that panel members at certain points in the process voted along party lines. The selection process was not harmonious and considerable controversy did result. When it came time to make selections as to the five best qualified, it is my understanding that panel members could not get a majority vote on more than two candidates. Therefore, by majority vote they passed a motion forwarding five names with a notation that three of the candidates received less than a majority vote. Mr. Shabaz was one of the three.

The members of the merit selection panel were asked to recommend five individuals, and that is what they did. However, I deeply regret that the selection process was not as harmonious as we had intended. Frankly, the merit selection panel in this case did not work very well. However, the problems associated with the work of the panel should not in any way detract from the excellent credentials John Shabaz brings to the Federal bench. He will, I believe, be an outstanding judge, and I respectfully urge your favorable consideration of John Shabaz as Federal judge.

Thank you, Mr. Chairman.

The **CHAIRMAN**. Mr. Shabaz, I congratulate you upon being recommended by and having the strong endorsement of Senator Kasten, who is a new Senator here but who has proven himself to be a very able Senator and is held in high esteem by the Members of the Senate.

We will now be pleased to hear from the senior Senator from Wisconsin.

STATEMENT OF HON. WILLIAM PROXMIRE, A U.S. SENATOR FROM THE STATE OF WISCONSIN

Senator PROXMIRE. Thank you, Mr. Chairman.

Mr. Chairman, this seems to be Clemson day at the Judiciary Committee. I think I can offer you more than anybody else with respect to Clemson. My son goes to Wake Forest, and Wake Forest did more for Clemson than I think any other university this year. Clemson happened to beat Wake Forest 82 to 14.

The CHAIRMAN. Eighty-two to 26. [Laughter.]

But Wake Forest is a very fine institution; they just had an offday.

Senator PROXMIRE. Inasmuch as you are the chairman, we will make it 82 to 26. [Laughter.]

Mr. Chairman, let me just say I appreciate the opportunity to appear before the Judiciary Committee to outline my reasons for opposing the nomination of John Shabaz for the position of U.S. district judge for the Western District of Wisconsin.

Let me emphasize at the outset that I believe Mr. Shabaz has shown competence, intelligence, ability, and integrity as a Republican leader in the Wisconsin State Assembly. There is no question about that.

But, in my view, this is not enough to qualify him for the important position of Federal judge for the Western District of Wisconsin.

Briefly, here are the reasons why I oppose the Shabaz nomination.

First, Mr. Shabaz does not reside in the Western District of Wisconsin. He is, instead, a resident a New Berlin, Wisc., which is in the Eastern District of Wisconsin.

I realize that it is not a requirement of Federal law that a judicial nominee live in the district of his or her appointment, but, as Congressman Kastenmeier has pointed out in a letter to Senator Kasten, "This has long been the tradition in Wisconsin."

For example, all the current Federal district court judges in Wisconsin were appointed from the same districts where they sit as judges.

Breaking the pattern and the practice in this case would reflect adversely on all the outstanding lawyers, judges, and law professors who now reside in the Western District of Wisconsin. We have an abundance of legal talent in the western district. To resort to an outsider for this key judicial post is unwise and unwarranted.

I should point out, too, that the last time an attempt was made in Wisconsin to appoint an outsider to the Federal district bench, the outcome was a failure. "Residency" was a significant issue in the unsuccessful effort to appoint Sheboygan attorney David Rabinovitz to a western district Federal judgeship in the 1960's.

I might say that the western district includes the great University of Wisconsin, which has a superb law school. It includes a number of outstanding, extremely well-qualified judges and lawyers.

Second, Mr. Shabaz has no judicial experience. In my view, before anyone, including Mr. Shabaz, is considered for an appointment to the Federal bench, that person ideally at least should have some testing as a judge. Serving, for example, as a circuit court judge in Wisconsin would provide highly desirable experience and training before moving up to a Federal judgeship. Again, Mr. Shabaz does not have that background, and, therefore, fails to measure up to that important standard.

Third, does Mr. Shabaz have other experience that is sufficiently relevant and extensive to qualify him for the position of U.S. district judge for the western district? My answer is "No," and here is why I take that position:

The focus of Mr. Shabaz' career as a lawyer has been a "neighborhood law practice." What does this involve? It deals primarily with the issues that confront ordinary citizens in their everyday lives. I have in mind, for instance, providing legal assistance in probate matters, buying or selling real estate, or domestic relations.

Is this kind of law practice important? It is most definitely, Mr. Chairman. Lawyers engaged in a career of this nature are providing valuable service to people who need help in resolving the most common legal problems facing them in their daily lives.

But this kind of law practice typically involves very little litigation of the type that one must rule on as a Federal district judge.

In short, the nature of Mr. Shabaz' law practice, while filling a useful function in society, has engaged him in the type of cases that are generally remote from those that would come before him as a Federal district judge.

Not only is the nature of Mr. Shabaz' law practice substantially unrelated to the kinds of cases he would have to rule on as a Federal judge, but, too, the simple fact is that Mr. Shabaz has devoted relatively little time to even that practice.

Mr. Shabaz graduated from law school in 1957 and then spent 7 years in full-time law practice—again, of the "neighborhood" variety. In 1964, he was elected to the Wisconsin State Assembly. At that point, therefore, he became a part-time lawyer.

In 1969, Mr. Shabaz was elected to the first of his leadership posts in the assembly, and he has continued to hold leadership positions ever since. Obviously, this has meant even less available time for his law practice.

So, Mr. Chairman, the main arena of Mr. Shabaz' professional career has been the Wisconsin State Legislature, not his law office.

By his own choice, Mr. Shabaz has pursued a career primarily in politics, not law.

Finally, Mr. Chairman, I want to bring to the Judiciary Committee's attention the views contained in a minority report subscribed to by 7 members of the 15-member Federal Judicial Nominating Commission for the Western District of Wisconsin.

By way of background, let me point out that Senator Kasten appointed seven members of this commission; I appointed three members; the State Bar of Wisconsin appointed four members; and the dean of the Law School of the University of Wisconsin at Madison was the other member.

The commission was established in order to: (a) Assist the U.S. Senators from Wisconsin in faithfully fulfilling their constitutional and statutory obligation to provide advice and consent to the President in appointing Federal district judges and U.S. attorneys; (b) help insure that qualified, conscientious, and dedicated individuals be appointed to serve the public in these positions; and (c) protect and preserve the independence and integrity of the legal process.

The commission's minority report was prepared and signed by the four commission members who were designated by the State Bar of Wisconsin. I would hope, Mr. Chairman, you would have a chance to read it or certainly have the staff read it because I think it represents a devastating criticism of this appointment.

My three appointees to the commission concurred in and signed the minority report, but of course they were my appointees. The four appointees of the bar association—I think the fact that they are objective and qualified gives their opinion particular weight.

The minority report speaks for itself in clear, concise terms. You have a copy of the report, Mr. Chairman, and I request that it be made a part of the hearing record.

In making this request, I should point out that the report was submitted on a confidential basis to the president of the State Bar of Wisconsin, Senator Kasten, and myself. But it was subsequently reprinted in full in the Wisconsin press, so a further reproduction in the hearing record of this committee in no way violates that initial request for confidentiality. The leaking of the report to the Wisconsin press, I should make clear, was not done through or with the approval or assistance of my office.

Mr. Chairman, I know that you and the other members of the Judiciary Committee will give the minority report of the commission the careful scrutiny that it deserves.

For all the reasons that I have outlined in this statement, I strongly urge the Judiciary Committee to reject the nomination of Mr. Shabaz for the position of U.S. district judge for the Western District of Wisconsin.

Let me add this final word: I urge the Judiciary Committee to act promptly on this nomination—promptly, one way or the other, up or down. The Western District of Wisconsin is a heavily overworked Federal judicial district. I think it is one of the most overworked in the country. It needs a judge in there promptly, so I hope you will act either to deny or to affirm this nomination shortly. We need additional help, as I say, as soon as possible.

Mr. Chairman, I ask that my full statement be printed in the record.

I want to say in conclusion, Mr. Chairman, that you are absolutely right that the score was 82 to 26.

The CHAIRMAN. Thank you very much, Senator.

Senator Proxmire has been here for a long time. He is held in high esteem, and of course his opinion will be given careful consideration.

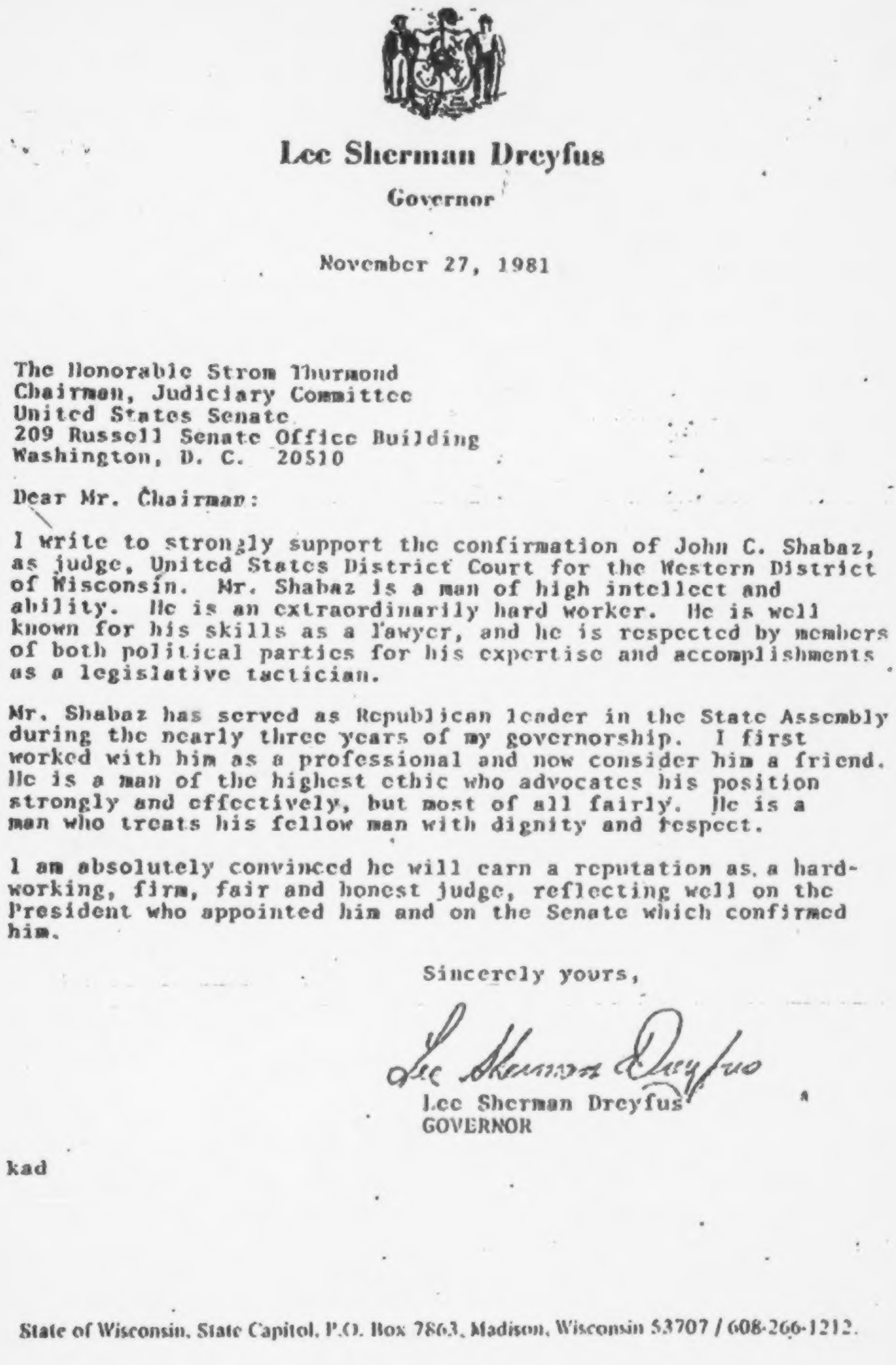
Without objection, the minority report of the Federal Judicial Nominating Commission will be placed in the record. You did want that in the record, Senator?

Senator PROXMIRE. I would appreciate that very much, Mr. Chairman.

The CHAIRMAN. As I understand it, the majority recommended Mr. Shabaz but there was a minority report.

There are several other letters here. One is from the Governor of Wisconsin, I believe. Gov. Lee Sherman Dreyfus recommends him, along with a number of other people. I will ask that, without objection, those letters be placed into the record, too.

[The letters referred to by Senator Thurmond follow:]



Lee Sherman Dreyfus
Governor

November 27, 1981

The Honorable Strom Thurmond
Chairman, Judiciary Committee
United States Senate
209 Russell Senate Office Building
Washington, D. C. 20510

Dear Mr. Chairman:

I write to strongly support the confirmation of John C. Shabaz, as judge, United States District Court for the Western District of Wisconsin. Mr. Shabaz is a man of high intellect and ability. He is an extraordinarily hard worker. He is well known for his skills as a lawyer, and he is respected by members of both political parties for his expertise and accomplishments as a legislative tactician.

Mr. Shabaz has served as Republican leader in the State Assembly during the nearly three years of my governorship. I first worked with him as a professional and now consider him a friend. He is a man of the highest ethic who advocates his position strongly and effectively, but most of all fairly. He is a man who treats his fellow man with dignity and respect.

I am absolutely convinced he will earn a reputation as a hard-working, firm, fair and honest judge, reflecting well on the President who appointed him and on the Senate which confirmed him.

Sincerely yours,

Lee Sherman Dreyfus

Lee Sherman Dreyfus
GOVERNOR

kad

State of Wisconsin, State Capitol, P.O. Box 7863, Madison, Wisconsin 53707 / 608-266-1212.

STEVE GUNDERSON
3D DISTRICT, WISCONSIN

Congreſs of the United States
House of Representatives
Washington, D.C. 20515

December 2, 1981

The Honorable Strom Thurmond
Chairman, Judiciary Committee
U.S. Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am pleased to join Governor Dreyfus and other Republican members of the Wisconsin congressional delegation in support of Assembly Minority Leader John Shabaz's nomination to the Federal judgeship in Wisconsin's Western District.

For five years John and I worked closely together in the Wisconsin Legislature. During that time I came to recognize his exceptional intellectual prowess and depth of legal knowledge. He earned great respect from legislators of both political parties, despite philosophical differences. That respect was based on not only his professional ability but his personal qualities.

His record as a legislator, legislative leader, and dedicated citizen demonstrates the valuable assets he will bring to the judgeship, should the Senate confirm his nomination.

The people of Wisconsin and the United States will be well served by John Shabaz and I wholeheartedly endorse his nomination to this position.

Best regards,

Steve Gunderson

Steve Gunderson
Member of Congress

SG:JWH

Congress of the United States
House of Representatives
Washington, D.C. 20515

December 3, 1981

The Honorable Strom Thurmond
Chairman
Committee on Judiciary
2263 Dirksen Building
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing in support of Mr. John Shabaz who has been nominated to be a federal judge for the Western District of Wisconsin.

I have known Mr. Shabaz, both personally and as a former colleague of his in the Wisconsin state legislature, for almost ten years and know him to be a very honest, hard working, capable and competent individual. Throughout the time I have known him he has consistently demonstrated a very sincere desire to do what is best for the people of Wisconsin. His work and leadership in the Wisconsin Assembly, where he is the Minority Leader, is respected by members of both parties.

Mr. Shabaz has been in the private practice of law since 1957 and the findings of the American Bar Association attest to his legal capabilities.

Mr. Shabaz would make a fine addition to the federal judiciary and I respectfully urge his confirmation.

Sincerely,

Thomas E. Petri
Member of Congress

TEP:gk

United States
House of Representatives

December 2, 1981

Honorable Strom Thurmond
Chairman, Committee on Judiciary
United States Senate
Washington DC 20510

Dear Mr. Chairman:

I would like to urge your support for favorable consideration of the Presidential Appointment for John C. Shabaz pending in your committee.

Mr. Shabaz and I share the same alma mater, duty in the United States Army and service in the Wisconsin Legislature. He has been recognized for his professionalism, dedication and leadership by being named Minority Leader for five consecutive sessions of the Wisconsin State Assembly. He has taken responsibility for achieving the legislative goals of his colleagues and his party for these past seventeen years.

John's intellectual expertise in law is not only theoritical but also practical. He shares my concern that both the criminal and the victim be assured sure and swift justice.

I believe that John C. Shabaz will contribute greatly to the strengthening of our judicial system. He will serve our President, this Administration and the citizens of Wisconsin with courage, integrity and distinction. Mr. Chairman, I respectfully ask that you join me and my colleagues from our state who know him well and find him worthy of this appointment.

Respectfully,

TOBY ROTH
Member of Congress

TR/gw

bcc: Hon. Lee Sherman Dreyfus
Hon. Robert Kasten

Congreſs of the United States
House of Representatives
Washington, D.C. 20515

December 4, 1981

Senator Strom Thurmond
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Mr. Chairman:

Though a previous commitment abroad prevents me from testifying before your committee today on the nomination of John C. Shabaz, I want to express my strong support for his appointment as U. S. District Judge for the Western District of Wisconsin.

I have known John personally and have worked closely with him on many legal matters over the last fifteen years. Consequently, I strongly recommend him for this appointment for several reasons.

First, John has an extensive knowledge of, and experience in, the law, gained through his full time practice of the legal profession since 1957. I have worked with him on several election recounts in Wisconsin, to cite just one example, and always have been favorably impressed with his thoroughness and hard work in doing his legal homework.

Second, John has extensive legislative experience, gained through seventeen years as a member of the Wisconsin Assembly. I believe the perspective obtained through this kind of experience is a necessary and desirable quality we should be looking for in our jurists. They are charged with interpreting and enforcing the law and, therefore, should have an understanding of the processes of lawmaking and incorporating legislative intent into the letter of the law, which John possesses.

Third, John enjoys the respect of his professional and legislative colleagues, even those who disagree with him on the issues. He has a reputation for being intelligent, articulate, and patient, as well as for being a superb legal practitioner always prepared to deal with the issues in question.

In closing, Mr. Chairman, I believe John C. Shabaz is a superbly qualified individual who would take his responsibilities very seriously and who would be a credit to the court. I urge your favorable consideration of him for this important post and hope the committee will take expeditious action on his appointment.

Sincerely,

Jim Sensenbrenner

F. JAMES SENSENBRENNER, JR.,
Member of Congress

WISCONSIN LEGISLATURE
SENATE CHAMBER
MADISON
53702

May 5, 1981

The Honorable Robert Kasten
U.S. Senator
221 Russell Senate Office Building
Washington, D.C. 20510

Dear Bob,

We, the undersigned Republican State Senators, wholeheartedly support JOHN SHABAZ for the appointment to the Western Wisconsin Federal Judgeship.

⑬ All but 1

Sincerely,

Senator Alan Lasee
1st Senate Distract

Senator Scott McCallum
18th Senate District

Senator David W. Opitz
20th Senate District

Everett V. Bidwell
Senator Everett Bidwell
27th Senate District

Senator Barbara Lorman
13th Senate District

Walter J. Chilsen
Senator Walter J. Chilsen
29th Senate District

Senator Richard Kreul
17th Senate District

Senator Daniel Theno
25th Senate District

Donald J. Hanaway
Senator Donald Hanaway
2nd Senate District

Senator Clifford Krueger
12th Senate District

James E. Harsdorf
Senator James Harsdorf
10th Senate District

Senator Rod Johnston
4th Senate District

Susan S. Engeleiter
Senator Susan Engeleiter
33rd Senate District

WE, THE UNDERSIGNED REPUBLICAN REPRESENTATIVES TO THE WISCONSIN LEGISLATURE, ENTHUSIASTICALLY ENDORSE THE NOMINATION OF JOHN C. SHABAZ TO THE FEDERAL JUDGESHIP OF THE WISCONSIN WESTERN DISTRICT. (39) SIGNATURES

All

REPRESENTATIVE JOHN ALBERTS, 84th DISTRICT	
REPRESENTATIVE JULE BERNDT, 30th DISTRICT	Jule Berndt
REPRESENTATIVE GORDON BRADLEY, 57th DISTRICT	Gordon Bradley
REPRESENTATIVE FRANCIS BYERS, 40th DISTRICT	Francis Byers
REPRESENTATIVE ERVIN CONRADT, 41st DISTRICT	Ervin Conradt
REPRESENTATIVE DEL DeLONG, 44th DISTRICT	Del DeLong
REPRESENTATIVE GARY DILWEG, 4th DISTRICT	Gary T. Dilweg
REPRESENTATIVE SHEEHAN DONOGHUE, 35th DISTRICT	
REPRESENTATIVE MICHAEL ELLIS, 55th DISTRICT	
REPRESENTATIVE PATRICIA GOODRICH, 72nd DISTRICT	Patricia A. Goodrich
REPRESENTATIVE ROBERT HARER, 29th DISTRICT	Robert Harer
REPRESENTATIVE DAVID HOPKINS, 67th DISTRICT	David K. Hopkins
REPRESENTATIVE JUNE JARONITZKY, 74th DISTRICT	June Jaronitzky
REPRESENTATIVE GEORGE KLICKA, 22nd DISTRICT	George H. Klicka
REPRESENTATIVE RANDALL KNOX, 39th DISTRICT	Randy Knox
REPRESENTATIVE JAMES LAATSCH, 80th DISTRICT	James J. Laatsch
REPRESENTATIVE JAMES LADWIG, 63rd DISTRICT	E. James Ladwig
REPRESENTATIVE ROBERT LARSON, 34th DISTRICT	Robert J. Larson
REPRESENTATIVE BERNARD LEWISON, 96th DISTRICT	
REPRESENTATIVE ESTHER LUCKHARDT, 54th DISTRICT	Esther Luckhardt
REPRESENTATIVE RICHARD MATTY, 88th DISTRICT	Richard P. Matty
REPRESENTATIVE EARL McESSY, 52nd DISTRICT	Earl McEssy
REPRESENTATIVE JOHN McEWEN, 86th DISTRICT	John McEwen
REPRESENTATIVE JOHN MERKT, 12th DISTRICT	John Merkt
REPRESENTATIVE BETTY JO NELSEN, 10th DISTRICT	Betty Jo Nelsen
REPRESENTATIVE MARY PANZER, 53rd DISTRICT	Mary Panzer
REPRESENTATIVE DAVID PAULSON, 28th DISTRICT	David E. Paulson
REPRESENTATIVE CLOYD PORTER, 43rd DISTRICT	Cloyd A. Porter
REPRESENTATIVE DAVID PROSSER, 42nd DISTRICT	David Prosser Jr.
REPRESENTATIVE ROBERT QUACKENBUSH, 92nd DISTRICT	R. Quackenbush
REPRESENTATIVE RANDALL RADTKE, 81st DISTRICT	Randall J. Radtke
REPRESENTATIVE ALAN ROBERTSON, 91st DISTRICT	Alan Robertson
REPRESENTATIVE EARL SCHMIDT, 87th DISTRICT	Earl W. Schmidt
REPRESENTATIVE LOLITA SCHNEIDERS, 97th DISTRICT	Lolita Schneiders
REPRESENTATIVE DONALD STITT, 60th DISTRICT	Donald Stitt
REPRESENTATIVE TOMMY THOMPSON, 79th DISTRICT	Tommy G. Thompson
REPRESENTATIVE ROBERT TRAVIS, 49th DISTRICT	Robert Travis
REPRESENTATIVE JOSEPH TREGONING, 51st DISTRICT	Joseph Tregoning
REPRESENTATIVE JOHN YOUNG, 99th DISTRICT	John M. Young

CIRCUIT COURT · BRANCH 8
Courthouse · Room 255
515 W. Moreland Blvd.
Waukesha, Wisconsin 53186

January 16, 1981

Hon. Robert Kasten, Jr.
United States Senator
Washington, DC 20515

Re: Federal Judgeship, Western District of Wisconsin

Dear Senator Kasten:

I am writing this letter to endorse the appointment of John C. Shabaz as Federal Judge for the Western District of Wisconsin.

I have known John for over 30 years and consider him highly qualified for this position .

In all matters in which John and I were involved as private attorneys and in matters in which he has appeared before me since I have been a Circuit Court Judge, I have known him to be a person of the highest integrity and ability.

He has always been well prepared in any matters in which I was involved; and, of course, I need not tell you that he is a man of his convictions, a hard worker and is unafraid to make decisions.

The Federal Judiciary would do well to ad him to its ranks.

Very truly yours,

John P. Buckley

GEORGE A. BURNS, JR.
JUDGE

Circuit Court

Civil Division - Branch 2
Courthouse
Milwaukee, Wisconsin 53233

March 4, 1981

Senator Robert W. Kasten, Jr.
Suite 221, Russell Building
Washington, D.C. 20510

Dear Senator Kasten:

I note with a great deal of interest that our mutual friend, John C. Shabaz, is a candidate for nomination to the federal bench in the Western District of Wisconsin.

I have known John for over twenty years. It would serve no salutary purpose for me to detail John's accomplishments as a lawyer and legislator. I am sure you know of his qualifications as well as anybody.

However, as one who shares the concern of many like yourself that we begin to put men on the federal bench who understand the true role of the judiciary, I would be remiss if I didn't make my endorsement of John a matter of record.

John Shabaz would bring to the bench a quality that is sadly lacking in our federal judiciary today -- a clear understanding that the sole function of a judge (and the only function) is to interpret the law as it is and not as the judge thinks it ought to be. The citizens of this country are tired of government by the judiciary. The activist judge has no place on the bench today.

I am confident that John will be one of those nominated by your Merit Commission. When he is, there is no question in my mind that he merits your whole-hearted support.

Please convey my good wishes to Steve Halloway and tell him I am very happy to learn that he is on your team.

All the best to you,

George A. Burns, Jr.
Circuit Court Judge

GAB/cmg

Circuit Court Chambers
Branch 1
Courthouse
Milwaukee, Wis. 53233

April 21, 1981

Western District Federal Judicial
Nominating Commission
c/o University of Wisconsin Law School
Madison, WI 53706

Attn: John Van Hollen, Chairman

Gentlemen:

I am writing this letter to recommend to you as one of your nominees for the Western District Federal Judicial appointment an individual that I have known for a considerable period of time, Mr. John C. Shabaz.

I have known Mr. Shabaz to be a practicing attorney and trial laywer for in excess of 20 years. As a matter of fact, as an Assistant City Attorney for the City of Milwaukee I had an opportunity to try several lawsuits with Mr. Shabaz as opposing counsel. He has had extensive trial experience as a lawyer in my court during the past 12 years. He has appeared before me in contested matters on many occasions and has always conducted himself in a manner worthy of the legal profession.

In my opinion, Mr. Shabaz is preeminently qualified by temperament, demeanor, experience and knowledge to be a Federal Judge. Because of his abilities, I recommend most earnestly that Mr. Shabaz be selected for this most important Federal Judicial appointment.

Very truly yours,

Louis J. Ceci

Louis J. Ceci
Circuit Judge

LJC/mr

January 30, 1981

Senator Robert W. Kasten, Jr.
Suite 221, Russell Building
Washington, D. C. 20510

Dear Senator Kasten:

The purpose of my letter is two-fold. First of all, I want to congratulate you on your stunning victory this past November and I certainly wish you well in your position as Senator. It appears to me that Wisconsin is well represented with you in Washington and I am sure you will do a commendable job. If I can ever be of any assistance to you in carrying out your senatorial duties, please do not hesitate to call upon me.

The second purpose of this letter is to encourage you, in the selection of a new Federal Judge for the Western District of Wisconsin, to consider seriously the qualifications of the Hon. John C. Shabaz, who now so ably represents his district and party in the Wisconsin Assembly.

My unique position as a trial judge in Milwaukee County for approximately 21 years, and having been Chief Judge for over four of those years, allows me to make observations concerning the members of this Bar which I dare say very few people have an opportunity to make. While I am somewhat reluctant to intrude my recommendations into the selection of a Federal Judgeship, I do, however, feel that Federal Judges are of such great importance to the people of this state that I am compelled to write to you recommending that you seriously consider Mr. Shabaz.

Attorney Shabaz, while not only being an outstanding legislator, as you no doubt know, is, in my opinion, a very competent attorney, always a gentleman and a credit to the legal profession. It is my considered opinion that were he to be appointed as a Federal Judge the position would be in extremely competent hands.

Again, allow me to wish you the best of everything.

Sincerely yours,

Robert M. Curley
Circuit Judge

RMC/se

Circuit Court
OF
MILWAUKEE COUNTY
COURTHOUSE
MILWAUKEE, WISCONSIN 53233

January 26, 1981

Hon. Robert W. Kasten, Jr.
United States Senator
Washington, D.C. 20515

Dear Senator Kasten:

It has been reported in the newspaper that Mr. John C. Shabaz is being considered for appointment as judge of the United States District Court for the Western District of Wisconsin. I recommend his appointment to you as an outstanding candidate for this important judicial assignment.

I have known Mr. Shabaz since 1957 when he was admitted to practice law in Wisconsin. Before being elected a judge, I had numerous cases in which we appeared as opposing counsel. In the past 21 years, he has appeared before me on hundreds of occasions as an attorney representing both the plaintiff and the defendant. He is a highly qualified trial lawyer. His skill as a practitioner qualifies him for appointment to this post.

I would also recommend him to you because of his qualifications as a person. He has the temperament that is needed. He is honest, kind, yet has the ability to be firm. He is respected in the legal community for his integrity and ability. You certainly are knowledgeable of his outstanding reputation in the political community.

Appointing authority should consider the needs of a court. Both judges of the Federal District Court of the Western District are persons who came to the court through the discipline of the law that relates itself to administrative agencies and government functions. While Mr. Shabaz is a man with great experience in the political arena, his training in the law is that of a trial lawyer. That experience would complement the bench of that district.

I consider it an honor to recommend the appointment of Mr. John C. Shabaz as judge of the United States District Court for the Western District of Wisconsin.

Yours very truly,

Leander J. Foley, Jr.
Circuit Judge

Chambers of Circuit Court
Civil Division — Branch 17
Courthouse
Milwaukee, Wisconsin 53233

February 4, 1981

Senator Robert W. Kasten, Jr.
Suite 221 Russell Building
Washington, D.C. 20510

Dear Senator Kasten,

I have not had the pleasure of meeting you, but did enjoy the results of the recent election which now finds you seated in the Halls of Congress as our United States Senator. I wish you good fortune and success in your labors on this latest plateau in your career. I know Wisconsin will be well represented through your efforts to bring this nation back to commonsense, stability and sanity.

I commend to you, with apologies for injecting myself into a very sensitive area, the Hon. John C. Shabaz, as a highly qualified nominee to the Federal Judiciary. Mr. Shabaz has distinguished himself in his practice of the profession of law and in the legislative halls where most state laws have their genesis. He has clearly, in my opinion, demonstrated that he is eminently well qualified for such consideration.

I have noted - I must admit with some amused interest - the recent media comments on the necessity for determining appointments to the Federal Judiciary on the basis of merit. While I wholeheartedly agree that "merit selection" is "a consumation devoutly to be wished for" history suggests that this objective is easier to posit than to achieve. The utilization of a committee to recommend a list of potential, qualified nominees, does little, if anything, to allay my concerns with regard to improving the quality of those who occupy these most important positions.

If the law were self administering or so exact a science as to eliminate the element of error, there would be no necessity for apprehension, but you are well aware that such is not the case. If the Federal Judge who says, "The law is what we say it is," speaks truthfully (and there is evidence that such is the case) then - considering the period of time during which a member of the Federal Judiciary exerts an impact on the future of this Republic - the character, experience and time-tested record of a nominee for this most important position are of paramount importance.

In the light of all of these factors, I recommend for your consideration, the Hon. John C. Shabaz.

Best Regards,

Hugh R. O'Connell

Hugh R. O'Connell
Circuit Judge, Br. 17

Circuit Court
Milwaukee County
Branch 21
Safety Building
Milwaukee, Wisconsin 53233

January 16, 1981

Honorable Robert Kasten
United States Senator
The United States Senate
Washington D.C.

Dear Bob:

I looked forward to receiving a notice, or an invitation to your inauguration - perhaps it shall still come.

Trusting that you have settled into your new position and that you are finding it as exciting as you expect it.

This letter is to recommend the appointment of Attorney John Shabaz as judge to fulfill the vacancy in the United States District Court for the Western District of Wisconsin.

John is a 1957 graduate of Marquette University Law School and primarily engaged in a neighborhood practice, and has brought experience as a trial lawyer.

John is married and the father of two children.

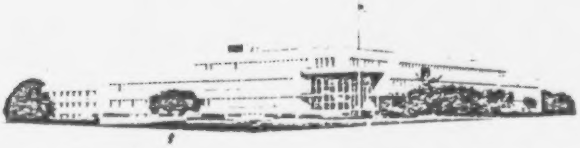
I believe if appointed Attorney Shabaz, who is presently the Minority Leader in the State House, will be a noteworthy addition to the Federal judiciary in Wisconsin and the judiciary in general.

Please call me when you are in the city the next time.

Very truly yours,

Clarence R. Parrish
CIRCUIT COURT JUDGE

CRP/dml



CIRCUIT COURT - BRANCH I - JUVENILE DIVISION
Courthouse - Room 303
515 W. Moreland Blvd.
Waukesha, Wisconsin 53186
Phone - 544-8241

May 1, 1981

Senator Robert W. Kasten
United States Senate
Senate Office Building
Washington, D.C. 20510

Re: John C. Shabaz

Dear Senator Kasten:

John C. Shabaz will be an excellent federal judge. He is capable, competent and certainly deserving of selection. His appointment represents a step toward providing a balance on the federal branch that is sadly lacking at this time.

Please add my strong endorsement of John Shabaz for appointment to the federal district judgeship.

With best personal regards, I remain,

Yours very truly,

HARRY G. SNYDER
CIRCUIT COURT JUDGE

COURT OF APPEALS
OF WISCONSIN
DISTRICT II
707 W. MORELAND BLVD.
WAUKESHA, WISCONSIN 53186

May 5, 1981

Honorable Robert Kasten
United States Senate Office Building
Washington, D.C. 20515

Re: Appointment of Western District Judge

Dear Senator Kasten:

I am writing this letter to recommend the appointment of State Representative John Shabaz for the vacancy in the Western District Court of Wisconsin.

I have known John Shabaz for over 20 years. He has practiced law before me while I was trial judge in Waukesha county for 18 years, and I have had occasion to know him personally as one of my representatives in the State Assembly.

He is highly qualified for the appointment by virtue of his extensive experience as a trial lawyer and his association with his party affiliations. I have no knowledge of the party work done by the other proposed appointees for this job, but I am well aware that Attorney Shabaz has been a hardworking, intelligent, able state legislator representing the republican party for the past several years. His qualifications eminently suit him for the position of federal judge.

Your consideration in appointing Representative Shabaz will be greatly appreciated.

Sincerely yours,

Clair Voss

Clair Voss
Presiding Judge
Second District Court of Appeals

CV/kje

cc: John Shabaz ✓

The **Chairman**. Senator, I would like to ask you this question. This gentleman is recommended by the junior Senator from Wisconsin. He is appointed by the President. Of course, the committee will have to vote on the matter.

I would like to ask you this, though, as the senior Senator, as a matter of courtesy here. Is Mr. Shabaz personally repugnant to you?

Senator **Proxmire**. No; he is not personally repugnant. As I say, I have respect for his integrity, his competence, his ability. I think I stated the reasons why I object, but he is not personally repugnant to me at all.

The **Chairman**. Thank you very much.

You gentlemen are excused.

[The prepared statement of Senator Proxmire and Federal Judicial Nominating Commission—Minority Report with accompanying letter, follows:]

STATEMENT OF SENATOR WILLIAM PROXMIRE BEFORE THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY ON THE NOMINATION OF JOHN C. SHABAZ FOR THE POSITION OF UNITED STATES DISTRICT JUDGE FOR THE WESTERN DISTRICT OF WISCONSIN

DECEMBER 4, 1981

Mr. Chairman, I appreciate the opportunity to appear before the Judiciary Committee to outline my reasons for opposing the nomination of John C. Shabaz for the position of United States District Judge for the Western District of Wisconsin.

Let me emphasize at the outset that I believe Mr. Shabaz has shown competence, intelligence, and ability as a Republican leader in the Wisconsin State Assembly.

But, in my view, this is not enough to qualify him for the important position of federal judge for the Western District of Wisconsin.

Briefly, here are the reasons why I oppose the Shabaz nomination.

First, Mr. Shabaz does not reside in the Western District of Wisconsin. He is, instead, a resident of New Berlin, Wisconsin which is in the Eastern District of Wisconsin.

I realize that it is not a requirement of federal law that a judicial nominee live in the district of his or her appointment.

But, as Congressman Kastenmeier has pointed out in a letter to Senator Kasten, "this has long been the tradition in Wisconsin."

For example, all the current federal district court judges in Wisconsin were appointed from the same districts where they sit as judges.

Breaking the pattern and the practice in this case would reflect adversely on all the outstanding lawyers, judges, and law professors who now reside in the Western District of Wisconsin. We have an abundance of legal talent in the Western District. To resort to an outsider for this key judicial post is unwise and unwarranted.

I should point out, too, that the last time an attempt was made in Wisconsin to appoint an outsider to the federal district bench, the outcome was a failure. "Residency" was a significant issue in the unsuccessful effort to appoint Sheboygan attorney David Rabinovitz to a Western District federal judgeship in the 1960's.

Second, Mr. Shabaz has no judicial experience. In my view, before anyone - including Mr. Shabaz -- is considered for an appointment to the federal bench, that person ideally should have some testing as a judge. Serving, for example, as a circuit court judge in Wisconsin would provide highly desirable experience and training before moving up to a federal judgeship. Again, Mr. Shabaz does not have that background, and, therefore, fails to measure up to that important standard.

Third, does Mr. Shabaz have other experience that is sufficiently relevant and extensive to qualify him for the position of United States District Judge for the Western District? My answer is "No" and here is why I take that position.

The focus of Mr. Shabaz's career as a lawyer has been a "neighborhood law practice." What does this involve? It deals primarily with the issues that confront ordinary citizens in their everyday lives. I have in mind, for instance, providing legal assistance in probate matters, buying or selling real estate, or domestic relations.

Is this kind of law practice important? It most definitely is, Mr. Chairman. Lawyers engaged in a career of this nature are providing valuable service to people who need help in resolving the most common legal problems facing them in their daily lives.

But this kind of law practice typically involves very little litigation of the type that one must rule on as a federal district judge.

In short, the nature of Mr. Shabaz's law practice, while filling a useful function in society, has engaged him in the type of cases that are generally remote from those that would come before him as a federal district judge.

Not only is the nature of Mr. Shabaz's law practice substantially unrelated to the kinds of cases he would have to rule on as a federal judge, but, too, the simple fact is that Mr. Shabaz has devoted relatively little time to even that practice.

Mr. Shabaz graduated from law school in 1957 and then spent 7 years in full-time law practice -- again, of the "neighborhood" variety. In 1964, he was elected to the Wisconsin State Assembly. At that point, therefore, he became a part-time lawyer.

In 1969, Mr. Shabaz was elected to the first of his leadership posts in the Assembly, and he has continued to hold leadership positions ever since. Obviously, this has meant even less available time for his law practice.

So, Mr. Chairman, the main arena of Mr. Shabaz's professional career has been the Wisconsin state legislature, not his law office.

By his own choice, Mr. Shabaz has pursued a career primarily in politics, not law.

Finally, Mr. Chairman, I want to bring to the Judiciary Committee's attention the views contained in a minority report subscribed to by seven members of the 15-member Federal Judicial Nominating Commission for the Western District of Wisconsin.

By way of background, let me point out that Senator Kasten appointed seven members of this Commission, I appointed three members, the State Bar of Wisconsin appointed four members, and the Dean of the Law School of the University of Wisconsin at Madison was the other member.

The Commission was established in order to:

> (a) assist the United States Senators from Wisconsin in faithfully fulfilling their constitutional and statutory obligation to provide advice and consent to the President in appointing federal district judges and United States Attorneys;
>
> (b) help insure that qualified, conscientious and dedicated individuals be appointed to serve the public in these positions; and
>
> (c) protect and preserve the independence and integrity of the legal process.

The Commission's minority report was prepared and signed by the four Commission members who were designated by the State Bar of Wisconsin. My three appointees to the Commission concurred in and signed the minority report.

Mr. Chairman, the essence of the minority report is that certain Commission members -- viz., those appointed by Senator Kasten - did not adhere to appropriate procedures during the selection process and, therefore, to quote the report, "such actions should negate the nomination of Mr. Shabaz."

The minority report speaks for itself in clear, concise terms. You have a copy of the report, Mr. Chairman, and I request that it be made a part of the hearing record.

In making this request, I should point out that the report was submitted on a confidential basis to the President of the State Bar of Wisconsin, Senator Kasten, and myself. But it was subsequently reprinted in full in the Wisconsin press, so a further reproduction in the hearing record of this Committee in no way violates that initial request for confidentiality. The "leaking" of the report to the Wisconsin press, I should make clear, was not done through or with the approval or assistance of my office.

Mr. Chairman, I know that you and the other members of the Judiciary Committee will give the minority report of the Commission the careful scrutiny that it deserves.

[At this point, let me simply bring to your attention two key passages from the minority report.

On page 2, the position of the minority report is set forth in these terms:

> The position of this Report is that the integrity of the selection process was, in this situation, subverted by the concerted action of seven Commission members, the Kasten appointees, who succeeded in turning the result of the Commission's designation into a political spoils system benefitting their pre-selected candidate, John Shabaz.

The minority report then goes on to detail how the Kasten appointees went about the business of insuring that Mr. Shabaz would be a Commission designee.

Following this bill of particulars about the approach utilized by the Kasten appointees to the Commission, the minority report reached this conclusion:

> In that the tactics and preference of the Shabaz bloc were determined before the facts ascertained by the Commission's investigation and interview process were even available, these members made a farce out of the function of the Commission, and certainly impugned the integrity of its

> results. It is the position of this Report that such actions border on scandal as being a fraud on the selection process. Objectively, such actions should negate the nomination of Mr. Shabaz, as the tactics used to obtain his designation make such designation a sham. Being apprised of these facts, it should be clear that neither Senator can in good conscience rely upon the Commission's designation of Mr. Shabaz.

For all the reasons that I have outlined in this statement, I strongly urge the Judiciary Committee to reject the nomination of Mr. Shabaz for the position of United States District Judge for the Western District of Wisconsin.

Let me add this final word. I urge the Judiciary Committee to act promptly on this nomination, one way or the other. The Western District of Wisconsin is a heavily overworked federal judicial district, so we need additional help as soon as possible.

P. O. Box 1497
Madison, Wisconsin 53701

1981 MAY -6 PM 2:56

May 4, 1981

Honorable Robert W. Kasten, Jr.
United States Senator
Senate Office Building
Washington, D. C. 20510

CONFIDENTIAL

Honorable William Proxmire
United States Senator
Senate Office Building
Washington, D. C. 20510

Attorney Lawrence J. Bugge, President
State Bar of Wisconsin
1 South Pinckney Street
Madison, Wisconsin 53703

Re: Federal Judicial Nominating Commission - Minority Report

Gentlemen:

This letter and the enclosed Minority Report are being submitted to you as the appointing authorities for the Commission. Approximately 1 week ago this Commission submitted its report designating five candidates for the position of United States District Judge for the Western District of Wisconsin. That report noted that the Commission failed to achieve a majority vote as to three of the five candidates. This resulted from the actions and tactics of certain Commission members who I believe misunderstood the purposes of the Commission.

Because the action of this group impaired the integrity of the functioning of the Commission in carrying out its assigned tasks, certain other members of the Commission feel compelled to set the record straight in order that the Commission process itself not be blamed for the unfortunate and misguided actions of some members. Thus, this Minority Report is being herewith submitted for your consideration.

While the actions described in the Minority Report certainly taint the designation of one nominee, they should not be construed to taint the designation of the other four nominees, who are extremely well qualified individuals clearly meriting their designation.

Concern for the future of the Commission process necessitates the request of the members joining in the minority report that the Report be treated in confidence. The ultimate goal of attaining the highest possible caliber judiciary cannot be served by introducing political byplay, and it is believed that any publication or other dissemination of this Report beyond the parameters of the Commission process could prove highly detrimental to that ultimate objective.

Your cooperation in honoring this confidentiality request is believed essential, and will be appreciated. The parties joining the Minority Report have all pledged confidentiality, and I am confident that this pledge will be respected. We have agreed to refrain from comment should press or other inquiries be received.

The only other possible distribution of the Minority Report might be to the American Bar Association Screening Committee should such a request be received.

I trust you will give careful consideration to the information contained in the Minority Report, and I will be happy to discuss this information with you individually on a confidential basis if requested.

Thank you for your consideration and for honoring the confidentiality request.

Very truly yours,

Thomas G. Ragatz

cc: All Commission Members

FEDERAL JUDICIAL NOMINATING COMMISSION
FOR THE UNITED STATES DISTRICT COURT OF THE
WESTERN DISTRICT OF WISCONSIN

MINORITY REPORT

To the Designation of Nominees for United States
District Judge for the Western District of Wisconsin

The purpose of this Report is to suggest that the Commission, which just completed its work, functioned in a manner inconsistent with its mandate and in a manner unfair to the participants, the applicants and the public. Because of the fact that three of the five candidates reported by the Commission to the Senators did not receive the affirmative vote of a majority of the Commissioner's membership, and because of the revelation of the voting tactics of a block of seven Commission members, this Minority Report is submitted to set the record straight.

The charter establishing the Commission specifies that among its purposes the Commission is to "help insure that qualified, conscientious and dedicated individuals be appointed to serve" and to "protect and preserve the independence and integrity of the legal process." Underlying the utilization of the Commission approach to selecting judicial candidates is the premise that these purposes were not being served by the political spoils system. The charter also dictates that the five most qualified candidates should be selected. Once the selection of five such candidates is completed, then the normal political process may proceed. When, however, some members of the Commission subvert their own independent judgment and submit to the dictates of politics in making such selection, the announced policy proves to be untrue and the purposes of the Commission are not achieved.

The position of this Report is that the integrity of the selection process was, in this situation, subverted by the concerted action of seven Commission members, the Kasten appointees, who succeeded in turning the result of the Commission's designation into a political spoils system benefitting their pre-selected candidate, John Shabaz. This is not to say that Senator Kasten had anything to do with these actions, as there is no reason to believe that he knew of or could have anticipated the misguided actions of these Commission members.

Candidate Shabaz received only the votes of this seven member block. In the judgment of the other seven Commission members participating, Mr. Shabaz is far less qualified than all of the other successful candidates and at least one (or more) of the unsuccessful semi-finalists, notably Judge James Boll; and based upon past experience Mr. Shabaz is believed unlikely to receive the approval of the American Bar Association screening committee should he receive the nomination.

Notwithstanding this, no Minority Report would have been even considered had the integrity of the Commission's purposes and procedures not been violated by what is now a patently obvious political power play. The Shabaz block, however originally selected, were tightly organized. They treated the Commission as a political process, and preceded the selection session by one or more secret caucuses where they received or determined their tactics for achieving the single objective of insuring that Mr. Shabaz would be designated among the panel of nominees. The decision to take such action was made prior to the April 25, 1981 interview session, and accordingly the interviews of the candidates were meaningless as to those members of the Commission. Thus, the time spent obtaining, reviewing, interviewing and evaluating candidates was obviously done while seven Commission members already had a secret predetermined result. It is now clear that the Shabaz block voted on the basis of determinations made, and/or encouragement, advice or direction received from others, prior to the meeting of the Commission, and did not, in fact, care what the candidates said or did in their oral presentations to the Commission. In addition, these seven members intentionally refrained from voting for obviously qualified candidates in order to eliminate from the panel persons whose presence would interfere with the ultimate selection of the candidate of their predetermined choice.

Their objective was accomplished by limiting their first ballot votes to two candidates, Mr. Shabaz and Wisconsin Supreme Court Justice William Callow, instead of designating the necessary five candidates. There was one exception in that one of the seven did cast an additional vote for one other candidate, Judge Thomas Barland. The first ballot then resulted in two candidates receiving a majority vote, Justice Callow (13 votes) and Judge Barland (8 votes). The Commission then proceeded to vote to fill the other three nominee positions, and on the two ballots that followed no candidate received more than seven votes and the seven member block voted only for Mr. Shabaz, casting but one vote each. Since only 14 of the 15 Commission members were present for the voting, this tactic stymied the Commission from naming any other nominees, as it had adopted a majority vote requirement. To break the deadlock, a motion was finally offered to designate the three candidates who had each received seven votes on the third ballot, and it passed on an eight to six vote.

Thus, the objective of the Shabaz block was achieved, at the expense of the integrity of the Commission and at the expense of an obviously well qualified Judge Boll, who had seven votes on the first ballot but only six on the second and third ballots. The tactics used also worked to the detriment of the vote totals of candidates Barland, Gehl and Fiedler, who among them on all three ballots got a total of one vote from the Shabaz block. Considering the outstanding qualifications of these four candidates and of Justice Callow, as compared to the qualifications of Mr. Shabaz, the result was a travesty on the purposes of the Commission.

Notably, when confronted at the end of the April 26th session with a charge that a covert political conspiracy had predetermined the concerted vote for Mr. Shabaz, the seven member block did not deny the charge, although these members had rejected the suggestion of such a predetermined result at an earlier session of the Commission. After their action they could not and did not deny it. Fortunately, the procedure in selecting the candidates for the United States Attorney did not follow the same pattern, although that change came about only after vehement objection to the prior conduct of the Shabaz block.

It should also be noted in respect to Mr. Shabaz that this Report recognizes and respects his considerable abilities as a legislator, but points out that more than 16 years ago he made a career decision to be a legislator. For over 16 years he has spent the majority of his time on his legislative career. In seeking the best qualified candidates the Commission initially agreed that extensive trial experience is a critical factor. It is the position of this Report, based upon the collective experience of the Commission's lawyer members, that a part time practitioner simply cannot, and in this case did not, develop the skills, experience and other qualifications to even approach a favorable comparison with the other four nominees and Judge Boll. Regretably, no member of the Shabaz block had any legal education, background or experience with which to evaluate the candidates, and in effect left the objective evaluation and the questioning of the candidates to the other Commission members. This clearly is a shortcoming of the Commission as presently constituted.

In that the tactics and preference of the Shabaz block were determined before the facts ascertained by the Commission's investigation and interview process were even available, these members made a farce out of the function of the Commission, and certainly impuned the integrity of its results. It is the position of this Report that such actions border on scandal as being a fraud on the selection process. Objectively, such actions should negate the nomination of Mr. Shabaz, as the tactics used to obtain his designation make such designation a sham. Being apprised of these facts, it should be clear that neither Senator can in good conscience rely upon the Commission's designation of Mr. Shabaz.

It is the position of this Report that the events here described raise serious questions as to whether the Commission process, under present membership selection practices, can serve its designated purposes; and further as to whether under the circumstances here experienced, the State Bar of Wisconsin should continue its participation by designating four Commission members. It is not desirable for the State Bar to lend credibility to a process which has been manipulated into a tool for political patronage. However, because of the critical importance of highly qualified judges to the successful operation of our judicial system, and thereby the continuation of our American form of government under our constitution, it behoves us to try to correct the deficiencies in the Commission process so it can fulfill the stated purposes, rather than to discard it because of the unfortunate and unacceptable current experience. For this reason, and so as not to destroy the utilization of the Commission concept in judicial selection, it is requested that this Report be maintained on a strictly confidential basis.

May 1, 1981

Thomas G. Ragatz,
Earl Munson, Jr.
Virginia H. Wolfe
James E. Brennan
Commission members by designation
of the State Bar of Wisconsin

The following other Commission members
concur in the Minority Report

June Weisburger
Jean Helliesen
and
Eileen Mershart, who participated
with the Commission except in the
interview sessions, but notes her
concurrence nevertheless

The CHAIRMAN. Now we will start with the nominees. We will start with the circuit judge first, Ralph K. Winter, Jr., of Connecticut.

If all six of the nominees would stand, I will give the oath at one time. That will save time.

Do you solemnly swear that the testimony you will give at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. WINTER. I do.

Judge CROW. I do.

Judge FORRESTER. I do.

Judge KRENZLER. I do.

Mr. GLASSER. I do.

Mr. SHABAZ. I do.

The CHAIRMAN. Thank you.

Mr. Winter, please come to the witness table first. I believe you are Dean Winter at the moment.

TESTIMONY OF RALPH K. WINTER, JR., NOMINEE, CIRCUIT JUDGE, SECOND CIRCUIT COURT OF APPEALS

Mr. WINTER. No, I am just a professor.

The CHAIRMAN. Oh, you are just a professor.

Mr. WINTER. Maybe I should say I am not just a dean; I am a professor. [Laughter.]

The CHAIRMAN. Mr. Winter, in response to the portion of the committee's questionnaire relative to judicial activism, you made this statement:

> * * * many judicial decisions, State and Federal, at the trial and appellate level, seem based on the personal values of the judges involved rather than traditional legal criteria such as custom, language, history, or legislative intent.

Now, Professor Winter, would you please elaborate on this point of criticism of judicial activism for the benefit of the committee?

Mr. WINTER. I should say by way of a prefatory remark that I was describing criticisms I had made in the past. My remark was directed to attitudes found to some degree in the judiciary, in law schools, and the profession, generally.

That attitude is that when a court perceives that a problem exists and there is no legislation dealing correctly with the problem, in the view of the judiciary, a court is free to seek out what it thinks is the best solution to the problem that if an issue was raised as a constitutional issue and there is nothing specifically in the Constitution about it, courts are free to decide what the Constitution ought to say about that.

I have criticized that attitude in the past. I think it is an unconstitutional performance of the judicial function, if you will. I stand by what I have said.

The CHAIRMAN. On all of these appointments here today we are not going to go into your background. That already has been done by those who recommended you or it is before the committee, anyway. Therefore, I will just propound some questions.

Professor Winter, in your article for the Washington University Law Quarterly entitled, "Changing Concepts of Equality: From Equality Before the Law to the Welfare State," you said in effect that society has shifted from the pursuit of one concept of equality to the pursuit of another. The former concept of equality you refer to as equality before the law; the latter you refer to as equality of social-political-economic status. Your conclusion concerning these two concepts is that both lead to regulation of the private sector. Would you please briefly tell the committee what you base this conclusion on?

Mr. WINTER. Equality before the law in the sense intended by 14th amendment sense is that law should not disable individuals from seeking to compete and seeking to utilize their own skills to their maximum advantage, whereas the modern contrary view is that the law should compel that all people come out equal, either through the use of quotas or by some kind of confiscatory tax preventing some from earning more than others.

Even if you emphasize the initial concept of not disabling people, there is still plenty of room for laws such as antitrust laws, civil rights laws, and the like, which prevent collective action by others from disabling people from competing in the private sector.

The CHAIRMAN. Professor Winter, you presently have two interests in pending litigation, *Luf* v. *Southbury,* which is pending in the Supreme Court of Connecticut, and *Landmarks Holding Corporation* v. *Bermant,* which was recently remanded to the U.S. District Court for the District of Connecticut. You informed the committee that the only possible arrangement by which you might be compensated is to retain an interest in any recovery and that you would seek an opinion as to propriety of this arrangement from the Judicial Ethics Committee.

Professor Winter, have you conferred with the Ethics Committee and, if so, what was the opinion of that organization?

Mr. WINTER. I have not yet received an opinion. The initial reaction I got from the Ethics Committee was that it was not their affair.

I submitted it to the Justice Department initially, the Office of Legal Counsel. I am now going to submit it both to the Judicial Ethics Committee and a second committee chaired by Judge Markey, but I have not yet received a ruling.

The guides to judicial conduct seem not to prohibit this kind of arrangement, although there is a presumption against it for quite obvious reasons.

The problem is that I have been a consultant to a very small law firm in New Haven that has used me to take on cases that it otherwise would not be able handle. We now are left in a position which none of us anticipated. Because the firm is too small, there is no way for me to be bought out. There is just no way for me to be compensated at all except through a contingent arrangement.

However, I will continue to seek an opinion. When I receive it, I will comply with it.

The CHAIRMAN. Would you advise the committee of that decision when it is reached?

Mr. WINTER. Yes, I will.

[The following material relative to the above colloquy was subsequently supplied by Judge Winter.]

84 Maple Vale Drive
Woodbridge, Connecticut 06525
December 14, 1981

The Honorable Howard T. Markey
Chairman, Advisory Committee on the
Codes of Conduct
717 Madison Place, N.W.
Washington, D.C. 20439

Dear Judge Markey:

I have been nominated and confirmed as U.S. Circuit Judge for the Second Circuit. At present, I plan to be sworn in in early January. As I explained in our phone conversation last week, I would like to obtain an opinion as to the propriety of arrangements I am about to make concerning compensation for past legal work.

In two pending cases I have done work for a small New Haven law firm representing the plaintiffs on a contingency basis. One case is in the state courts and involves issues relating to constitutional "takings." The other, an antitrust case, is presently the subject of a petition for rehearing *en banc* in the Second Circuit after a decision reversing and remanding a grant of summary judgment in the District of Connecticut.

The firm is simply too small to commit itself to a fixed fee payment for the services I have performed. The antitrust case, for example, represents five years of work and a substantial claim for damages. Literally hundreds and hundreds of hours are involved. A fixed payment even remotely related to the time I have put in would bankrupt the firm if a recovery were not in hand when the payments came due.

I propose to make the following arrangements. My share in the state court case will be paid to me as compensation for past services if and when a recovery is had. My share in the antitrust case will be merged with that of another lawyer who has withdrawn his appearance. To the extent that a reduction of our combined share is necessary in order to retain new counsel, that lawyer will conduct the negotiations in which I will play no part. I will be paid my share, which is solely for past services, if and when a recovery is made.

I will, of course, have nothing more to do with either case and will not sit on any case involving any of the plaintiffs' attorneys until the litigation is completed. Nor will I sit on any matter which involves legal issues which are directly involved in the two cases.

The canons and subsequent opinions discourage contingency arrangements. I have no partnership share which can be bought out, however, and fixed payments for my contingency shares is simply not possible. If the proposed arrangement is not proper, I would appreciate any advice you and your colleagues might have as to alternative methods by which I might be paid for the services rendered.

Although I doubt that it matters, you should be informed that Judge Newman sat as a district judge on the antitrust case for roughly three years.

Sincerely,

RALPH K. WINTER

THE ADVISORY COMMITTEE ON CODES OF CONDUCT
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
717 MADISON PLACE, N.W.
WASHINGTON, D.C. 20439

JUDGE PETER T. FAY
JUDGE DAMON J. KEITH
JUDGE ANTHONY M. KENNEDY
JUDGE CORNELIA G. KENNEDY
JUDGE JON O. NEWMAN
JUDGE FREDERICK A. DAUGHERTY
JUDGE JACOB MISHLER
JUDGE CHARLES E. SIMONS, JR
JUDGE JOHN P. FULLAM
JUDGE J. FOY GUIN, JR
JUDGE WILLIAM J. JAMESON
JUDGE ROBERT VAN PELT

JUDGE HOWARD T. MARKEY
CHAIRMAN

633-6585
633-6562

February 25, 1982

Mr. Ralph K. Winter
84 Maple Vale Drive
Woodbridge, Connecticut 06525

Subject: Docket No. 317

Dear Mr. Winter:

In response to your inquiry of December 14, 1981, the Committee sees no impropriety in the arrangements outlined in your letter.

A fixed compensation for your past services being impossible to arrange, your plan is to receive your share in the state court and antitrust cases if and when a recovery is obtained. Your share in the antitrust case will be merged with that of a lawyer who has withdrawn, and may be reduced to the extent necessary for retention of new counsel. You will take no part in negotiations relating to that retention, will render no further services of any kind in either case, and will not sit in any case involving the law firm for which you rendered the service, or involving legal issues raised in the two cases. It thus appears that your receipt of compensation will not depend on the fortunes of the law firm and you will be isolated from any opportunity of contributing to the potential for recovery in the two involved cases.

As you know, the Committee's function is solely advisory. The final decision in any ethical situation must remain the responsibility of the individual judicial officer.

For the Committee,

Chairman

The CHAIRMAN. How do you feel personally about your own capacity at this point in your career to carry out the very significant power and responsibility of being a circuit court judge?

Mr. WINTER. I think I am able to carry them out. While I lack experience in some areas, I have a great deal of experience in studying Federal law. Most of my teaching and writing has been about Federal law. I am familiar with many of the important, substantive areas facing Federal courts.

The CHAIRMAN. I would like to get your view on this: Is it your view that the Congress makes the law, that Congress determines the policy, and that the judiciary should interpret the law?

Mr. WINTER. Yes, that is the position I have always taken.

The CHAIRMAN. Do you have any members of your family that you would like to introduce?

Mr. WINTER. I do not, Senator.

The CHAIRMAN. Thank you very much.

Mr. WINTER. Thank you, Senator.

The CHAIRMAN. You are excused now.

Judge Crow, will you come forward, please?

Judge Crow, do you have any members of your family with you that you would like to introduce?

TESTIMONY OF JUDGE SAM A. CROW, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF KANSAS

Judge CROW. No, I do not, Mr. Chairman.

The CHAIRMAN. Judge Crow, you were a part-time U.S. magistrate from 1973 until 1975, at which time you assumed full-time duties. Do you believe that U.S. magistrates are being properly utilized and do you have any recommendations for improvements in the judicial system?

Judge CROW. I think the new statute, Mr. Chairman, which deals with the expansion of the jurisdiction of magistrates, which involves the consent of the parties to the litigation to permit the magistrate to try either court or jury cases in civil matters, is an expansion and a very proper one.

The CHAIRMAN. Judge Crow, do you feel that there is a need for judges to assume direct control over complex issues and cases in order to avoid delays and to effectively manage such cases?

Judge CROW. In some instances, yes, I do, Mr. Chairman.

The CHAIRMAN. Judge Crow, Federal law now provides for U.S. magistrates to try civil, jury, and court cases with the approval of the parties and the district judges. In your experience, are the majority of U.S. magistrates certified as competent to act in the capacity as district judges in these cases?

Judge CROW. Mr. Chairman, I can direct my thoughts only to the District of Kansas really. I believe in the District of Kansas they are certainly very well qualified and have been certified by the 10th circuit chief judge as being competent to try those matters.

The CHAIRMAN. Judge Crow, do you believe that a district court judge should cause the Government to meet a greater burden of proof than that required by law?

Judge CROW. No, I do not, Mr. Chairman.

The CHAIRMAN. Judge Crow, do you believe changes in the law should be reserved to the legislature whose members can be altered by the voters if the elected official fails to reflect the values of society?

Judge CROW. Very definitely; yes, sir.

The CHAIRMAN. In other words, you believe that Congress should make the law and the policy and that judges should interpret the law, or do you believe as some judges have done—if they do not agree with it, they will in effect hand down decisions that will practically make the law?

Judge CROW. Congress has that responsibility, Mr. Chairman.

The CHAIRMAN. Do you have any members of your family here?

Judge CROW. No, sir, I do not.

The CHAIRMAN. You are excused.

Judge CROW. Thank you.

TESTIMONY OF JUDGE J. OWEN FORRESTER, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF GEORGIA

The CHAIRMAN. Next we have Judge Forrester of Georgia.

Judge Forrester, do you have any members of your family with you that you would like to introduce?

Judge FORRESTER. I do not know how many of them are in the room. I have my two small sons and my wife and two good friends from Georgia and a good Navy commander who is a good friend who lives up here in the District.

The CHAIRMAN. I would like for them to stand. We welcome them here. We are pleased to have you here.

Judge Forrester, you served approximately 7 years as an assistant U.S. attorney, and you have been a U.S. magistrate for the last 5 years. With this background, can you give the committee any recommendations you might have for improvements in the Federal judicial system?

Judge FORRESTER. Mr. Chairman, I do not have any sweeping proposal to offer. I think the recommendations on the Bail Reform Act that have been made by the recent commission are quite good.

A small thing that a magistrate would notice that other judges would not is a recent rule by the fifth circuit that requires the preparation of a transcript in every case dispositive matter before the district judge can rule on it. I do not think that is what you intended when you passed the act. If that is not, I think it would be something that probably could be straightened out to benefit not only the district judges but the taxpayers who have to pay for those transcripts.

The CHAIRMAN. Judge, do you feel that U.S. magistrates are properly utilized or should they be given a greater role in the judicial system?

Judge FORRESTER. To my mind, we have all the power that you can delegate to us We have to go through a learning process with the bar where the bar becomes accustomed to what we can do and how well we can do it if we do.

The one matter that I think I would like to bring to your attention is that the legal assistants or clerical law clerks that you have approved are a great aid. It potentiates the magistrate's efficiency a great deal. I know not all magistrates have this. I would urge you to do that. Law clerks are a lot cheaper than judges or magistrates.

The **Chairman**. Judge, what in your opinion is needed to speed up the disposition of Federal cases? Would it be more judges, magistrates, or changing the criminal procedures or the judges working a little longer and a little harder?

Judge **Forrester**. I am sure we could all do the last. I think that is probably uniformly the case.

I feel only in my district that there are many things that our judges could refer to magistrates that they do not because there are no more of us than there are. I have not had a chance to see the new 11th circuit operate, but I know that the old fifth was terribly burdened. If you were to put additional manpower in the system, the two ends of the system, the appellate level and the magistrate level, might be from my point of view a good place to do it.

I know that for a long time everybody in the judiciary has been very anxious to try to write learned opinions. I know that there are a lot of judges now who are trying to rule from the bench a little bit more with a lot of preparation before trial. I think that could help a lot, particularly in civil matters, in moving the business.

Those are some thoughts.

The **Chairman**. Judge, do you think it is necessary for attorneys to receive specialized training before being allowed to practice in Federal court?

Judge **Forrester**. Not in Federal courts, Senator. I think some renewed emphasis on litigation skills by the State bar would certainly be beneficial to all of us.

The **Chairman**. Judge Forrester, would you give the committee your views on judicial activism?

Judge **Forrester**. I do not believe that I will be one, but I cannot tell you that.

The **Chairman**. You do not have any idea of becoming one, do you? If so, we would like to know it now.

Judge **Forrester**. Not——

The **Chairman**. We want judges who will interpret the law and not attempt to make the law.

Judge **Forrester**. What I started to say was that I believe in the separation of powers. I have been taught that as a child, as a student, and as a lawyer. I believe in it wholeheartedly. I do not think that we are the oracle of social policy in this country; I think you are.

I think that the case or controversy clause means what it says, and that I should not reach issues that are not before me. I will to the best of my ability restrain my activities within the purview of the Constitution.

The **Chairman**. You think you could restrain yourself as a judge from handing down decisions that would have the effect of making law rather than interpreting the law?

Judge **Forrester**. In the sense in which you ask the question, Senator, I feel confident that I could do it. Everything a judge does has some precedential value here, there, or yonder. However, in the sense that you are asking the question, I believe that I most certainly can.

The CHAIRMAN. That is all, Judge. You are excused.

Judge FORRESTER. Thank you, Senator.

The CHAIRMAN. Next we have Judge Alvin I. Krenzler, of Ohio, to be U.S. district judge for the Northern District of Ohio.

You already have introduced your family, I believe.

TESTIMONY OF JUDGE ALVIN I. KRENZLER, NOMINEE, U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

Judge KRENZLER. Yes; Senator Metzenbaum introduced my family, Ambassador Wolf, and Bob Hughes. There are two other people with me that were not introduced. Mrs. Hughes is here and a family friend, Pat Glass, is here. I would like to introduce them.

The CHAIRMAN. Judge Krenzler, you have served on the Eighth District Court of Appeals for the State of Ohio for the past 11 years. This, I believe, is an intermediate court of appeals which sits in panels of three judges. During this time, I understand you have heard over 3,000 cases and have written over 1,000 opinions, of which 120 were published. Judge, do you foresee any difficulty in the transition from your present position in the appellate court to that of trial judge at the Federal district level?

Judge KRENZLER. No; it will be a very easy transition. I have had considerable trial experience both privately and governmentally. I have been a trial judge. At the appellate level we read transcripts of trial proceedings, so we are thoroughly familiar with both the substantive and procedural aspects of the law. Therefore, I look for a very easy transition.

The CHAIRMAN. Judge Krenzler, you not only have had many years of experience as a judge, but you have also served as counsel and director of the Ohio Narcotics Investigation Bureau. With this background, would you give us your views on penalties for second- or third-time drug dealers?

Judge KRENZLER. Yes; when we drafted the Ohio narcotics law back in the fifties we made a distinction between users and dealers and the commercial aspects of it. It is my view that the dealers, second or third or even first offenders, should be dealt with very harshly, and the incarceration should come very easy.

The CHAIRMAN. As you know, this is a very terrific problem today. These drug dealers are let off too lightly. They make so much money that they can pay if you give them a fine. I have often wondered if the judges should give more prison sentences for drug dealers rather than just letting them pay a fine.

Judge KRENZLER. That is correct. The commercial drug dealers should not be able to buy their way out. The profits in drugs are so tremendous that the fine, while it could even be big, does not mean anything to them. It is like nickels and dimes. The only answer to them is incarceration.

The CHAIRMAN. Judge, there are serious problems in some prisons, particularly from the standpoint of overcrowding and effective rehabilitation. The Attorney General's task force on violent crimes recently suggested that there should be an increase in the number of jail cells available to incarcerate persons convicted of violent crimes. Would you give us your views on this suggestion as well as any recommendations you might have regarding prison reform?

Judge **Krenzler**. Yes; on prisons and reforms of prisons and rehabilitation, my view has been that you have to take a look at each defendant separately. There are some people who are totally incorrigible. They commit violent crimes. They are repeat offenders. You just totally waste rehabilitation on them. They should be treated separately than those one-time offenders who commit minor crimes of a nonviolent nature.

Those who commit violent crimes, especially the repeaters, should be incarcerated. We should have sufficient prisons to take care of them.

The **Chairman**. Judge, one of the characteristics of judicial activism is that there is a tendency by the judiciary to impose broad, affirmative duties upon governments and society. Would you give this committee your views on this criticism?

Judge **Krenzler**. We have separation of powers. The legislative body should make the law; the court should interpret it. Once the case is decided, the court should step out of the matter. The courts should not use their position to make governmental policy. That is a matter for the legislature. The courts should not continue a case and take over administrative duties and run Government agencies. The court should just do its job interpreting the law and stop at that point.

The **Chairman**. Is it your firm conviction that the matter of making the law should be left to the Congress, whereas the judiciary should be limited to interpreting the law?

Judge **Krenzler**. Yes; the legislative branch makes the law, makes the governmental policy, and the judicial branch should just interpret that law.

The **Chairman**. I think that is all the questions I have. Thank you. You are excused now.

Judge **Krenzler**. Thank you.

The **Chairman**. The next nominee is Israel Glasser, of New York.

Do you have any members of your family here you would like to introduce?

TESTIMONY OF ISRAEL LEO GLASSER, NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK

Mr. **Glasser**. Yes, Senator, I do. I am pleased to introduce my wife.

The **Chairman**. Please have her stand.

Mr. Glasser, you have been dean of the Brooklyn Law School for the past 4 years, I believe?

Mr. **Glasser**. That is correct.

The **Chairman**. I am certain you found this to be a very rewarding and demanding experience which you no doubt handled with a great deal of competence. You are now, however, seeking the position of U.S. district judge. What do you perceive to be some of the major demands and pressures of this new position and how will you attempt to resolve them for yourself?

Mr. **Glasser**. Senator, I foresee the major demands as being the courteous, efficient, and orderly disposition of the tremendous volume of cases which are filed in the Eastern District of New York. I believe the experience I have acquired in running a fairly large institution, one of the largest law schools in the country, will serve me in good stead in that connection.

The CHAIRMAN. Mr. Glasser, you are considered to be an excellent theorist. However, you do not have a great deal of trial experience. Is that correct?

Mr. GLASSER. That is correct.

The CHAIRMAN. Do you think this relative lack of trial experience will in any way prevent you from properly performing your required duties as a trial district judge?

Mr. GLASSER. No, sir, I do not. I have been a State court judge for approximately 8 years, during which time I presided over literally thousands and thousands of cases ranging from homicide down to assault, child abuse, custody, and a whole variety of things.

I believe the experience I acquired over that period of time, in addition to the experience I have acquired as a result of 33 years at the bar, will present very little problem for me in that regard.

The CHAIRMAN. Your experience in the family court in the State of New York?

Mr. GLASSER. Yes.

The CHAIRMAN. Mr. Glasser, would you give the committee your thoughts on what, if any, specialized training attorneys should undergo before they are allowed to practice in Federal courts?

Mr. GLASSER. The law schools are beginning to address that problem, Senator, by increasing emphasis upon clinical education and increasing emphasis upon skills training courses, such as trial advocacy and drafting and negotiating skills, and so on.

However, I think the most effective thing that law schools can do and that courts and bar associations can do is to go back to the days in which we placed enormous emphasis on inculcating into young lawyers and law students the need for thorough preparation and the need for a respect for the dignity of the profession and the demands which that profession makes upon lawyers, which I think combined will move lawyers to prepare themselves for the effective advocacy of cases in the Federal courts and other courts.

The CHAIRMAN. Mr. Glasser, the New York State Court of Appeals recently reversed a decision which allowed the prosecution of a man who sold pornographic movies depicting children engaged in explicit sexual activity. The court said that such cases as these would have to be judged by community standards. Mr. Glasser, do you feel that the present laws pertaining to child pornography are adequate and, if so, would you encourage increased enforcement in this area?

Mr. GLASSER. Senator, I have had the experience of presiding over literally thousands of cases involving child abuse and all forms of delinquency. I would have preferred to have seen the court come down on the side of a compelling State interest in protecting the lives and well-being of children rather than pornography. I would favor a stronger enforcement of that law.

The CHAIRMAN. I am very glad to hear you say that. I hope all of our judges will take a tough position like that.

Mr. Glasser, a portion of the committee's questionnaire relative to judicial activism states that there is a tendency by the judiciary to impose itself upon other institutions in the manner of an administrator with continuing oversight responsibilities. To this observation, you responded:

"* * * If reasonable alternatives are available, the judiciary should not impose itself upon other institutions in the manner of an administrator. * * *"

Would you give the committee an example of the reasonable alternatives to which you were referring?

Mr. GLASSER. One example is perhaps a greater use of negative decrees, that is, decrees which would enjoin State and local officials from engaging in conduct which a court has appropriately found to be violative of some constitutional provision, and then perhaps utilize the contempt law which the court has in enforcing its decrees rather than reaching out and attempting to run institutions, which I do not think courts have been intended to do, nor do I think judges by and large are terribly anxious to do.

The CHAIRMAN. In many places now judges have practically taken it upon themselves to run school systems, to dictate to hospitals and dictate to State agencies. Those of us who have a different philosophy feel that was not the intention of the Constitution. I just wonder how you feel.

Mr. GLASSER. I am in complete agreement.

The CHAIRMAN. Thank you. You are excused.

Mr. GLASSER. Thank you, Senator.

TESTIMONY OF JOHN C. SHABAZ, OF WISCONSIN, NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF WISCONSIN

The CHAIRMAN. Mr. Shabaz, will you come forward, please?

Do you have any members of your family here?

Mr. SHABAZ. No, I do not, Senator.

The CHAIRMAN. If Senator Kasten wants to appear with you, he may feel free to do so. I see he is still here.

Mr. Shabaz, in Wisconsin there are two Federal judicial districts, the Eastern District which is based in Milwaukee and the Western District which is based in Madison. Now as I understand it, you live in New Berlin, Wis., which is located in the Eastern District. Mr. Shabaz, do you see this as a potential problem since you have been nominated for a position in the Western District of Wisconsin?

Mr. SHABAZ. Not at all, Senator. I believe that the dispensation of justice should not follow geographical guidelines. Might I also say, Senator, that I did go to the University of Wisconsin for 4 years at Madison, which is in the Western District. My family has its roots in Madison, my wife's family. They have been farming there for many years in that area.

I have served in the legislature since 1964 maintaining a part-time residence in Madison, which is in the Western District. In fact, Senator, I have perhaps one of the strangest types of offers to purchase that I can recall. It indicates that the purchase of my new home in the Western District in Madison would be contingent upon confirmation by the U.S. Senate. That type of offer already has been proposed by my wife and myself.

The CHAIRMAN. Mr. Shabaz, you graduated from the University of Wisconsin in 1953 I believe, and in 1957 obtained your LL.B. degree from Marquette University.

Mr. SHABAZ. That is right.

The CHAIRMAN. You were admitted to the bar this same year. Would you briefly describe for the committee the nature of your law practice since that time and specifically the amount of trial work you have been involved in?

Mr. SHABAZ. Extensive trial work, Mr. Chairman. The fact is that I have been engaged in rather complicated legal matters, to include personal injuries, contractual matters, declaratory judgments, injunctive proceedings, recount proceedings in which we have asked for original jurisdiction before our Wisconsin Supreme Court, in which I am presently engaged. That has been a rather extensive practice as it concerns the varied areas to which I have referred in my previous résumé, Mr. Chairman.

The CHAIRMAN. You have tried cases in the State courts, in the Federal courts, and you feel that your experience in both has been adequate to become a good district judge?

Mr. SHABAZ. I do believe that I have that trial experience, Mr. Chairman.

The CHAIRMAN. Mr. Shabaz, you served 2 years active duty with the U.S. Army, and during that time you were the regimental trial counsel to a training regiment at Ft. Leonard Wood, Mo. I am sure that you would have prosecuted a number of offenses which were subject to special courts martial jurisdiction in violation of the Uniform Code of Military Justice. Would you have any idea at this time the total number of cases that you may have prosecuted and the results obtained?

Mr. SHABAZ. Many hundreds, and I would imagine, Senator, it would reach into the thousands under the Uniform Code of Military Justice, the 1951 edition of that particular Act. There were substantial prosecutions which I had in that area as the regimental trial counsel for Combat Command B in Ft. Leonard Wood, Mo.

The CHAIRMAN. Mr. Shabaz, you have stated that your background is that of a neighborhood lawyer in a large metropolitan community. I see nothing wrong with a neighborhood practice, and maybe more attorneys should be engaged in this type of endeavor.

There are those, however, who feel that this type of law practice is too far removed from the type of cases that would come before you as a Federal district court judge. How would you answer this concern?

Mr. SHABAZ. I think that equal justice and the dignity of the human being is important no matter what court that person is in, whether that person has the small contractual matter, the recovery of an obligation, but it is that first time before a court of law that is very difficult for most persons to accomplish. They do deserve that representation. I do represent large corporations. I represent major financial institutions. I also believe that that smallest case sometimes can be the most important case. The dispensation of justice at all levels is so very important.

The CHAIRMAN. I construe somewhat the word "neighborhood lawyer" that you use there as possibly helping your neighbors and helping the people in the community and not as a lack of experience or disqualification. Is that your feeling?

Mr. SHABAZ. Yes, sir. I used that term in my first résumé when I presented it before the Judicial Commission in Wisconsin on April 25 of this year, in which I indicated, yes, I have a neighborhood law practice in a large metropolitan community, and it is doing for your neighbor those particular legal problems that come before you from time to time.

The CHAIRMAN. Mr. Shabaz, I know that you were first elected to the Wisconsin legislature in 1964 and have served in the State assembly ever since. In 1969 you were selected as the assistant majority leader of the assembly. You were elected as minority leader of the assembly in 1973 and have been elected to that post every two years thereafter, to include the current 1981 session. This surely takes a great deal of your time, and you are to be commended for this effort.

However, I wonder if the time required in public service in any way has caused you to fail to give proper attention to those who have sought your service as a practicing attorney.

Mr. SHABAZ. No, it has not, Senator. It has not in any way deprived my clients of the legal services to which they are entitled. It does mean that Sundays——

The CHAIRMAN. You had to work overtime.

Mr. SHABAZ. It means Sundays in the office, except we do not go into the office in July and August on Sundays.

The CHAIRMAN. I was a State senator once and had a law practice. I would be in Columbia, the capital, all week and then come home and I would have to work all weekend to try to catch up with my law practice to keep things going.

Mr. SHABAZ. That is it.

The CHAIRMAN. I presume you have the same experience.

Mr. SHABAZ. That is what it has been since 1965. We do our trials on Mondays and Fridays. Our legislative sessions are usually Tuesdays, Wednesdays, and Thursdays, so it does give us that opportunity to conduct our trials on the weekends.

The CHAIRMAN. Now for the record I would like to ask you a few more questions.

Mr. Shabaz, you have not served as a U.S. magistrate or on the bench in the State courts to date. Do you feel that this lack of judicial experience will in any way prevent you from performing the services of a district court judge?

Mr. SHABAZ. No, I do not. I believe as a practicing lawyer—yes, sir?

The CHAIRMAN. There has been some criticism concerning the work of the merit selection panel that recommended you and several others. Do you have any comments on any of the statements that have been made today about the procedures used by the panel?

Mr. SHABAZ. Mr. Chairman, I was not privy to the proceedings in which the names were selected. I do know that the process was not successful as perhaps the authors of the proposal would have liked to have had it. I am not familiar with those proceedings.

The CHAIRMAN. Mr. Shabaz, as I have previously stated to other nominees, I consider judicial temperament to be a prerequisite for a Federal judge. I have seen Federal judges embarrass lawyers, embarrass jurors, and embarrass witnesses. I thought it was absolutely inexcusable. The higher a man gets in life, I think the more humble he ought to be.

A judge has tremendous power. I am just wondering if you would give me your thoughts on this subject.

Mr. SHABAZ. Mr. Chairman, I could not expand upon that. I recall the first day in law school in which I was called out of my seat by a professor who knew that law and of course I did not. I recall the castigation perhaps that I felt at the time because I was not as knowledgeable as I should have been. That experience has been with me for a long period of time.

It seems to me that you are right—the higher the office, the more we owe that dignity to those persons who perhaps have not achieved that particular office.

The CHAIRMAN. Mr. Shabaz, what actions in your professional and personal life evidence your concern for equal justice under the law?

Mr. SHABAZ. I have represented thousands of clients in every walk of life. I have attempted to do it to the best of my ability. I participate in the lawyer referral services from the Milwaukee Bar Association, advocating the causes of our clients with minimal fees or without fees and attempting to just do the best job I can for those persons who come to me with the confidence that they have in me to represent them.

The CHAIRMAN. Mr. Shabaz, in response to the committee questionnaire concerning the criticisms involving judicial activism, you stated in part:

"The Constitution should be interpreted as it was written rather than as we would like to have seen it written."

Would you please expand on your views concerning judicial activism?

Mr. SHABAZ. I would not be considered a judicial activist. I believe that the Constitution is to be interpreted as it was written, not as those persons who would like to have seen it written some other way. I am very jealously guarding the separation of powers. I would believe that, as we said so many years ago in a creed that was taught me by the U.S. Jaycees, that government should be of laws rather than of men.

The CHAIRMAN. There are numerous letters of support for you. We have placed those in the record already, I believe.

Now I understand there are a few witnesses here who want to speak a word in your behalf: Hon. Russell Olson, Lieutenant Governor of Wisconsin and Acting Governor.

Is he here?

Mr. SHABAZ. Yes, he is.

The CHAIRMAN. Would you come forward, please, Governor Olson?

The other witness is Hon. Lou Ceci, circuit judge, presiding judge of the Milwaukee Civil Division.

Judge Ceci, please come forward, too.

Please raise your hands and be sworn.

Do you swear that the statement you will give in this hearing is the truth, the whole truth, and nothing but the truth, so help you God?

Lieutenant Governor Olson. I do.

Judge Ceci. I do.

The CHAIRMAN. Please be seated.

I do not think we need to take long statements. Would you briefly, Governor Olson, give us your appraisal of this nominee?

STATEMENT OF HON. RUSSELL OLSON, LIEUTENANT GOVERNOR AND ACTING GOVERNOR, STATE OF WISCONSIN

Lieutenant Governor Olson. Thank you, Senator.

Mr. Chairman, I am Russell Olson, Lieutenant Governor of the State of Wisconsin. It is an honor for me to appear here today on behalf of a great many citizens of this State of Wisconsin, including myself and Lee Dreyfus, our Governor, who is out of the country at this time.

We wholeheartedly support and recommend the Senate confirmation of John Shabaz to the Federal court in Wisconsin. Mr. Shabaz has served the State of Wisconsin well as a member of the legislature for nine consecutive 2-year terms, starting in January of 1965. He has been his party's uncontested choice for minority leader of the Wisconsin assembly since January of 1973. He has been chosen for his leadership and for his ability to quickly analyze a problem and come up with the correct solution.

John Shabaz has the respect of both political parties because he says and does what he believes is fair and right.

I have known John Shabaz both politically, as a member of the legislature, and socially, and regard him and his wife as close and trusted friends. No one who has ever worked with him would question the capability of John Shabaz. The speaker and the majority leader of the Wisconsin State Assembly, both members of the opposing political party, have recently and publicly proclaimed there was no question that John Shabaz would be a capable jurist.

Circuit Judge Louis Ceci and I have traveled here today to impress to Members of the U.S. Senate our confidence in John Shabaz and the urgency which we feel his appointment deserves.

I think I speak for the leadership of our party when I say that once John Shabaz showed an interest in the appointment there was no doubt he should be the appointee. We have the rare opportunity to appoint to an important decisionmaking position a man who has driven himself to excel in all his endeavors—education, family, law practice, politics, and government—and I am confident he will make us all proud by continuing to excel as a Federal judge.

I thank you for this opportunity.

The CHAIRMAN. We are glad to have you with us, Governor. Thank you for your testimony.

The CHAIRMAN. We will be glad to hear from Hon. Lou Ceci, circuit judge.

Judge, would you care to make a statement?

STATEMENT OF HON. LOUIS J. CECI, CIRCUIT JUDGE, PRESIDING JUDGE, MILWAUKEE CIVIL DIVISION

Judge CECI. Mr. Chairman, it is an honor for me to be here today.

My testimony in favor of the confirmation of Mr. John C. Shabaz concerns itself primarily with his abilities and considerable legal experience obtained as a practicing trial attorney for some 24 years.

We first became acquainted as adversaries in the late 1950's or early 1960's when I was a prosecutor and Mr. Shabaz appeared as defense counsel for individuals or corporations I was prosecuting. He was a very able and worthy advocate of his clients' positions and rights while his demeanor always reflected the deep dedication he has to the basic principles of our profession.

These have always included an emphasis on thoroughness, quality, and professional integrity which has continued down through the years I have known and respected him.

As a trial judge for the past 13 years in Wisconsin's largest trial district, it has been refreshing to note other judges commenting on Mr. Shabaz' knowledge and incisive application of the law. His abilities as a litigation counsel and capacity for hard work and long hours are known and appreciated throughout the district.

A trial lawyer bears a heavy responsibility of maintaining the integrity of the adjudicatory process. Whether he participates in a trial as a member of a team from a multilawyer firm or as a sole practitioner, he must still maintain the lofty goals and standards of our profession. This Mr. Shabaz has always achieved while also maintaining a position of leadership in the Wisconsin Legislature.

Mr. Chairman, I believe it to be indicative of the high esteem in which Mr. Shabaz is held by the legal community that knows him best that you have before you letters written by other trial judges who have urged Senator Kasten and the President to nominate him for this most important judicial position. These judges, from various backgrounds, reflect a wide range of differing philosophical persuasions, including a former district attorney of Milwaukee County.

One letter is from a former chief judge of our county and former chairman of the National Metropolitan Courts Association. I also understand that one of those letters is from my immediate predecessor as presiding judge of the civil division.

It is my understanding that the Western District of Wisconsin has one of the largest backlogs of cases pending. Mr. Shabaz' proven talents as a practicing trial lawyer of more than 24 years' experience, his resourcefulness, industry, temperament, and capacity for hard work, as testified to you by these letters and myself, will stand him in good stead for the obligations of a Federal trial judge.

I am confident that if this committee recommends confirmation and the U.S. Senate does confirm Mr. Shabaz, the backlog of that district will soon dissipate.

Predicated, Mr. Chairman, upon his abilities, integrity, temperament, and outstanding competency as a many-faceted trial lawyer, I respectfully request this committee to recommend to the U.S.

Senate the confirmation of Mr. John Shabaz to become a Federal district judge.

Thank you, sir.

The CHAIRMAN. Thank you.

I have a letter here signed by Tom Loftus, majority leader, and Ed Jackamonis, speaker of the assembly, who speak highly of the nominee. I just wanted the record to note that. I believe they are both Democrats, aren't they? The assembly is controlled by the Democrats?

[The letter referred to above is on file with the committee.]

Lieutenant Governor OLSON. That is correct. That is the speaker and the majority leader.

The CHAIRMAN. That completes the hearing.

Again I want to congratulate you, Mr. Shabaz, for having the strong endorsement of Senator Kasten. I think that will insure your confirmation.

I have been impressed with all of the judges who have testified here this morning, and I feel they are all well qualified. I shall personally support all of them.

The hearing is adjourned.

[Whereupon, at 12:55 p.m., the hearing adjourned, subject to the call of the Chair.]

[The following was received for the record:]

BIOGRAPHIES

ALVIN I. KRENZLER

NOMINEE U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF OHIO

Birth: April 8, 1921, Chicago, Ill.

Legal residence: Ohio.

Marital status: Married to Adeline Rasher Krenzler, three children.

Education: 1939-40—Ohio University, 1941-42—Adelbert College; 1945-46—Western Reserve University, A.B. degree; 1946-48—Adelbert College, Western Reserve University, LL.B. degree; 1961-63—Georgetown University Law Center, LL.M. degree.

Bar: 1948—Ohio.

Military service: 1942-45—United States Navy, honorable discharge.

Experience: 1948-56—Jappe & Jappe, associate; 1950-57—assistant attorney general, State of Ohio; 1953-54—Ohio Narcotics Investigation, counsel and director; 1957-59—Ohio Department of Motor Vehicles, deputy registrar; 1956-59—private practice with Robert Krupansky, 1958-59—Benish, Freelander, Coplan and Arnoff; 1960—Williams, Krenzler, Bartoonak and Welf; 1960-63—Internal Revenue Service, trial attorney; 1963-68—Godfrey, Ginsberg, Guren and Merritt; 1968-70—judge, common pleas, Cuyahoga County; 1970 to present—judge, 8th District Court of Appeals, State of Ohio.

J. OWEN FORRESTER

NOMINEE U.S. DISTRICT JUDGE, NORTHERN DISTRICT OF GEORGIA

Birth: April 27, 1939, Columbus. Ga.

Legal residence: Georgia.

Marital status: Married to Linda Myrick Forrester, two children.

Education: 1957-61—Georgia Institute of Technology, B.S. degree, 1962-66—Emory University School of Law LL.B. degree.

Bar: 1965—Georgia.

Experience: 1966-67—Callaway for Governor Committee staff attorney; 1967-69—Fisher and Phillips, Atlanta, Georgia, associate; 1969-76—assistant U.S. attorney, Northern District of Georgia; 1976 to present—United States magistrate, Northern District of Georgia.

SAM A. CROW

NOMINEE U.S. DISTRICT JUDGE, DISTRICT OF KANSAS

Birth: May 5, 1926, Topeka, Kans.
Legal residence: Kansas.
Marital status: Married to Ruth M. Rush Crow, two children.
Education: 1944-49—University of Kansas, B.A. degree; 1949-52—Washburn University School of Law, J.D. degree.
Bar: 1952—Kansas.
Military service: 1944—U.S. Navy; 1953-54—U.S. Army (inactive reserve 1954 to present), Colonel USAR.
Experience: 1951-53—Rooney, Dickinson & Prager, Topeka, Kans., law clerk; 1954-63—Rooney, Dickinson & Prager, partner; 1963-70—Dickinson, Crow, Skoog & Honeyman, Topeka, Kans., partner; 1971-75—Crow & Skoog, Topeka, Kans., partner; 1975 to present—U.S. magistrate, District of Kansas, Topeka, Kans.

RALPH K. WINTER, JR.

NOMINEE, U.S. CIRCUIT JUDGE, SECOND CIRCUIT, COURT OF APPEALS

Birth: July 30, 1935, Waterbury, Conn.
Legal residence: Connecticut.
Marital status: Married to Kathryn Higgins Winter, one child.
Education: 1953-57—Yale University, B.A. degree; 1957-60—Yale Law School, J.D. degree.
Bar: 1973—Connecticut.
Experience: 1960-61—Law clerk to Hon. Caleb Wright, U.S. District Court, District of Delaware; 1961-62—Law clerk to Hon. Thurgood Marhsall, U.S. Court of Appeals, Second Circuit; 1961 to present—Professor of law, Yale Law School; 1966 (summer)—Adjunct Professor, University of Chicago Law School; 1968-70—Senior Fellow, Brookings Institute; 1972 to present—Adjunct Scholar, American Enterprise Institute.

ISRAEL LEO GLASSER

NOMINEE, U.S. DISTRICT JUDGE, EASTERN DISTRICT OF NEW YORK

Birth: April 6, 1924, New York City.
Legal residence: New York.
Marital status: Married to Grace Gribetz Glasser, four children.
Education: 1939-43—New York City College, B.A. degree; 1945—University of Birmingham, England; 1946-48—Brooklyn Law School, LL.B. degree, magna cum laude.
Bar: 1948—New York.
Military service: 1943-46—U.S. Army.
Experience: 1948-69—Brooklyn Law School, professor; 1969-77—Judge, Family Court of the State of New York; 1977 to present—Dean, Brooklyn Law School.

JOHN C. SHABAZ

NOMINEE, U.S. DISTRICT JUDGE, WESTERN DISTRICT OF WISCONSIN

Birth: June 25, 1931, Milwaukee, Wisc.
Legal residence: Wisconsin.
Marital status: Married to Kathryn A. Kritz Shabaz, two children.
Education: 1949-53—University of Wisconsin; 1953-54—Marquette University; 1956-57—LL.B. degree.
Bar: 1957—Wisconsin.
Military service: 1954-56—U.S. Army.
Experience: 1957 to present—Private practice, West Allis, Wisc.; 1964 to present—State Representative, Wisconsin Legislature.

CONFIRMATION HEARING ON:

HAROLD L. RYAN, DAVID L. RUSSELL, AND GLENN L. ARCHER, JR.

FRIDAY, DECEMBER 11, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 12:15 p.m., in room 2228, Dirksen Senate Office Building, Senator Strom Thurmond (chairman of the committee) presiding.

Present: Senator Thurmond.

Staff present: Duke Short, chief investigator; and Pamela Swanner, clerk.

NOMINATION OF HAROLD L. RYAN, DAVID L. RUSSELL, AND GLENN L. ARCHER, JR.

The CHAIRMAN. The committee will come to order.

We have a hearing this morning for two U.S. district Judges, Harold L. Ryan of Idaho to be U.S. district judge for the District of Idaho, and David L. Russell of Oklahoma to be U.S. district judge for the Eastern, Western, and Northern Districts of Oklahoma. We are very pleased to have these gentlemen here. First we will take the Senators from those States so we can excuse them because they are so very busy.

We will ask the nominees if you will stand, and I will give you your oath now. Mr. Archer, who has been appointed to the Justice Department, Tax Division, if you will stand too, Mr. Archer, I will give the oath to all of you.

Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. RYAN. I do.

Mr. RUSSELL. I do.

Mr. ARCHER. I do.

The CHAIRMAN. Just have a seat.

Is Congressman Craig here? Is he here? He indicated he wanted to be present.

We are very pleased to have the senior Senator and the junior Senator from Idaho today. Idaho is very ably represented in the Senate. At this time we will hear from the senior Senator.

Senator, we are very glad to have you with us.

STATEMENT OF HON. JAMES A. McCLURE, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator McClure. Thank you very much, Mr. Chairman. It is a pleasure to be before your committee in any circumstance, and to work with you on the matters that we do work together on, but a particular pleasure for me to introduce to the committee Harold L. Ryan, a nominee of the President of the United States for district judge in the District of Idaho.

I have known Hal for over 30 years. We were at the University of Idaho Law School at the same time. His father practiced law in a small community 14 miles away from the community in which I grew up, where my father practiced law, and we had somewhat parallel careers for a number of years, as we went to law school and went back to join our fathers in the practice of law.

Then I went to the State legislature where, 2 years later, Hal joined me in the State senate, representing his county in the State senate. We have been close personal friends for all of the years intervening. I cannot say what a pleasure it is for me to be able to present to the committee this man who has the very finest of personal qualifications as well as impeccable legal qualifications, having been very active in the practice of law, having been a commissioner and president of the State bar association in Idaho.

One of the gratifying things that has happened in my lifetime is seeing the response when the nomination was announced, the response of the organized bar and others in Idaho who have stepped forward almost to a man and said this is one of the best-qualified people we have ever had the opportunity to put on the Federal bench.

I thank you, Mr. Chairman.

The Chairman. Senator Symms, we are very pleased to have you with us. We would be glad to hear from you in behalf of this nominee.

STATEMENT OF HON. STEVE SYMMS, A U.S. SENATOR FROM THE STATE OF IDAHO

Senator Symms. Thank you very much, Mr. Chairman. I too am happy to be here before your committee.

My association with Hal Ryan does not go back quite as far as does Senator McClure's, but I have had the honor of knowing Hal for sometime. I first met Hal Ryan in 1966 through Senator McClure when the good Senator was serving Idaho as a State senator, and was in the process of running for Congress for the first time. That was my initial association with Hal Ryan, and I cannot tell you how pleased I am that he made the decision to accept the appointment to sit on the Federal bench in Idaho. I believe he will be a credit to the bench.

His reputation certainly is that which has been described by Jim McClure. Importantly he is reflective of our President as far as a general outlook and attitude toward having equity from within the judicial practice and the judicial application of the laws. I believe he will be a fine judge and I am proud to recommend him to the committee.

The Chairman. Thank you very much, Senator Symms.

Mr. Ryan, you are highly recommended by both of these Senators, and I am sure because of their fine recommendation and your endorsement, that you will have no trouble being confirmed.

Senator McClure. Mr. Chairman, I might just note for the record that Congressman Craig had wanted to be here this morning. I can only assume that business in the House of Representatives has detained him because he has grown up in the same general area and knows Mr. Ryan. Their families have known each other for years and years and years, and I know that he is sorry that he could not be here.

The Chairman. Senator, you might tell the Congressman if he cares to get a statement over for the record we will keep the record open today, and any time today he may put a statement in.

Senator McClure. Thank you very much.

The Chairman. Thank you gentlemen, you Senators, for coming. You are now excused and we will take the next nominee, David L. Russell of Oklahoma. Mr. Russell, we are glad to have you with us. You have already been sworn. We will call on you to testify in just a moment, after the Senators here have spoken in your behalf.

We have both Senators here at this time. I want to say to you, Mr. Russell, you have two very able Senators. One is a Democrat and one is a Republican but so far as I am concerned they are both topnotch Senators, very able men. They are making a fine record.

Our junior Senator here, Don Nickles, has made a very fine impression on the Senate, even though he has been here a very short time. Your other Senator, David Boren, has also made a very fine impression for the years he has been here. In fact, he is such a good Senator, I felt he ought to sit on the other side of the aisle. [Laughter.]

We will be glad to hear from you now, Senator Nickles.

STATEMENT OF HON. DON NICKLES, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator Nickles. Thank you, Senator Thurmond. On behalf of Senator Boren, we wish to thank you very, very much for the fine job that you have done and your staff has done in allowing us to expedite this hearing as soon as possible, and for your cooperation in this matter. I think it just shows the quality and the manner in which you have become such an outstanding leader in the Senate.

Mr. Chairman, it is my honor today to introduce to this committee David L. Russell, who has been nominated by President Reagan for U.S. district judge in the State of Oklahoma. I have known Mr. Russell for many years, and he has done an outstanding job and has an excellent reputation throughout the State of Oklahoma.

He served as chief legislative assistant to U.S. Senator Dewey Bartlett from the year 1973 to 1975, and I know that that speaks well in your mind as it does in mine. From 1975 to 1977, he served as U.S. attorney for the Western District of Oklahoma, a position, Mr. Chairman, which he currently holds, as President Reagan reappointed him to that position earlier this year.

Mr. Chairman, earlier this year when it became apparent that there would be a vacancy on the Federal court, I appointed and selected a nine-member bipartisan committee for the selection of a

Federal judgeship. They screened, I think, a total of 40-some candidates from throughout the State of Oklahoma.

Upon their recommendation, and I will mention, their unanimous recommendation for Mr. Russell to fill this position, I certainly concur with their views. It is my pleasure to recommend Mr. Russell to become the U.S. district judge for the State of Oklahoma. I have every confidence that he will represent the President in a manner of which the President and this country can be very proud.

The CHAIRMAN. Thank you very much, Senator. We appreciate your appearance and your testimony.

We will now be glad to hear from Senator Boren.

STATEMENT OF HON. DAVID L. BOREN, A U.S. SENATOR FROM THE STATE OF OKLAHOMA

Senator BOREN. Thank you very much, Mr. Chairman.

First I want to compliment Senator Nickles on the process which he followed in making this recommendation. He did follow the recommendation of an outstanding bipartisan panel of citizens of our State, and I heartily concur in the recommendation of Senator Nickles and the recommendation of that panel that David Russell be appointed Federal District Judge for Oklahoma.

I have known Mr. Russell for a long time. When I was a member of the State legislature and he first came to public office as an assistant attorney general of our State, he was highly regarded in that capacity. He then served then-Governor Bartlett as his legal assistant in the Governor's office, and, as Senator Nickles has said, he later worked for Senator Bartlett here in Washington.

Three times I have been asked during background checks for my opinion about the nominee, twice when he was named as U.S. attorney for the Western District, and now this latest appointment. Each time I have been pleased to say that I knew of no person who was better qualified for the position that he was being considered for than David Russell.

He is a very able lawyer. He is a person of absolute integrity. That is his reputation in our State. He is a person of fair judgment and I would say, Mr. Chairman, also of sound judicial philosophy. I heartily recommend his confirmation to the committee.

The CHAIRMAN. Thank you very much, Senator. I know how busy you are, and there is a vote on too, so you are now excused.

Senator Warner, if you will come around you can probably finish your statement before the 5-minute bell rings. Mr. Archer, you can probably come around with him. We have already sworn in Mr. Archer, Senator Warner, and we would be very pleased to hear from you at this time.

Senator WARNER. I thank the chairman. I apologize for being late. I was presiding over at the Senate and came straight from the Chamber.

We are honored, Mr. Chairman, to have Mr. Archer's wife, Vera, with us this morning, if she would kindly stand and be recognized by the Chair, and his daughter, Sharon, and other friends.

The CHAIRMAN. I am glad to have you with us.

STATEMENT OF HON. JOHN W. WARNER, A U.S. SENATOR FROM THE STATE OF VIRGINIA

Senator WARNER. Mr. Chairman, I am pleased to present to you Glenn L. Archer, Jr., nominated by the President to the position of Assistant Attorney General for the Tax Division.

In Virginia there is often much discussion about who is a true Virginian—meaning native-born. However, I have always felt that some people are lucky enough to be born in Virginia and others are smart enough to move there. Mr. Archer is a smart man. He was born in Kansas, and decided to move to the great Commonwealth of Virginia, and now resides in Falls Church.

He received his undergraduate degree at Yale University in 1951, then furthered his education at George Washington University Law School, where he graduated in 1954. Finishing law school, he joined the U.S. Air Force Reserve, serving as a lieutenant in the Judge Advocate General's office.

Leaving military service in 1956, he then joined the Washington law firm of Hamel, Park, McCabe & Saunders as an associate. When he joined the firm—and I have known it well, Mr. Chairman, when I was engaged in private practice in the Nation's Capital—at that time the firm was highly regarded, rather small, and specialized in tax matters. The firm has since grown, now having 50 lawyers. Mr. Archer has been with the firm for the past 24 years and is currently a senior tax partner. His association with the firm has allowed him to acquire an in-depth knowledge and experience in nearly all major areas of tax practice.

In his career, he has participated in a number of contested and litigated tax cases on every level, including administrative, trial, and appellate. His clients have sought his consultation on matters concerning tax planning, administration, and legislation.

Mr. Chairman, I recognize that the chairman indicated as soon as the second bell rang we would terminate the hearing. I will submit the balance of this statement for the record.

The CHAIRMAN. Without objection, the balance of your statement will be placed in the record.

Mr. Archer, I want to congratulate you in having the very able Senator from Virginia, Senator Warner, to recommend you and endorse you. He is one of the ablest Senators in the Senate and one of the finest men, and that means a lot to the committee.

Senator WARNER. I thank the Chair for his graciousness.

[The prepared statement of Senator Warner follows:]

PREPARED STATEMENT OF JOHN W. WARNER

Mr. Chairman and members of the committee, I am pleased to present to you Glenn L. Archer, Jr., who has been nominated by the President for the position of Assistant Attorney General, Tax Division, in the United States Department of Justice.

In Virginia, there is often much discussion about who is a true Virginian—meaning native born. However, I've always felt that some people are lucky enough to have been born in Virginia and others are smart enough to move there. Glenn Archer is a smart man. Having been born in Densmore, Kansas, he decided to move on to the great Commonwealth of Virginia and now resides in Falls Church.

Glenn received his undergraduate degree at Yale University in 1951. He then furthered his education at the George Washington University Law School where he was graduated with honors in 1954.

Finishing law school, Glenn joined the United States Air Force Reserves, serving as a 1st Lieutenant in the Judge Advocate General's Office.

After completing military service in 1956, Glenn then joined the Washington Law firm of Hamel, Park, McCabe & Saunders as an associate. When he joined this firm, it was a small, but a highly regarded law firm that specialized in tax matters. The firm has since grown and now has fifty lawyers. Glenn has been with Hamel, Park, McCabe & Saunders for the past twenty-four years and is currently a senior tax partner. His Association with the firm has allowed him to acquire an in-depth knowledge and experience in nearly all major areas of tax practice.

In his career, he has participated in number of contested and litigated tax cases on every level, including administrative, trail and appellate. His clients have sought his consultation on matters concerning tax planning, administration and legislation.

Glenn's clients have ranged from individuals, partnerships, estates and trust, charitable organizations business and corporations. The subject matters have been equally diverse. He has considerable experience in the taxation of oil, gas and minerals interested. He has also been involved in the cases concerning tax aspects of corporate acquisitions and reorganizations, charity and foundation tax matters, foreign and tax treaty questions. Other cases have included taxation of executive compensation and fringe benefits, excise taxes, taxation of estates and trusts and civil and criminal tax fraud proceedings.

Glenn has been admitted to practice before the United States Supreme Court, the Court of Appeals for the District of Columbia, the U.S. District Court for the District of Columbia, the U.S. Tax Court and the U.S. Court of Claims.

He is a member of the American Bar Association, Section of Taxation, where he served as Assistant Secretary from 1973 to 1975 and then Secretary from 1975 to 1977. He is Chairman of its Annual Report Committee and member of the Natural Resources and Planning Committees. He is also a member of the District of Columbia Bar, the Bar Association of the District of Columbia. Other membership included the National Tax Association-Tax Institute of America and the Legal Fraternity, Phi Alpha Delta.

Glenn is married to the former Vera P. Wiseman. They have four children, Susan, Sharon, Glenn and Thomas.

The CHAIRMAN. We are going to take a recess now so that we can go and vote.

[Brief recess.]

The CHAIRMAN. We regret the interruption on account of matters on the Senate floor.

I believe our first witness now is Harold L. Ryan of Idaho. Mr. Ryan, if you will come around, have a seat.

Mr. Ryan, do you have any of your family here you would like to introduce?

Mr. RYAN. Senator, I do not. My wife could not get here but I do have a friend from my home town who lives back here. He is a lieutenant commander in the Navy.

The CHAIRMAN. You can present him if you like.

Mr. RYAN. This is Frank Bowman—Frank, if you will rise up—Marion Eugene Bowman, a good friend, and I appreciate his being here.

TESTIMONY OF HAROLD L. RYAN, NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF IDAHO

The CHAIRMAN. Mr. Ryan, as a practicing attorney and a former Idaho State senator, you have had the opportunity to both make laws as well as to utilize and interpret them. With this background, do you believe that changes in the law should be reserved to the legislature whose members can be altered by the voters if the elected official fails to reflect the values of society?

Mr. RYAN. Absolutely, Mr. Chairman. I believe in the separation of powers. Public policy questions particularly should be handled by the legislative body.

The CHAIRMAN. Mr. Ryan, one of the issues that has been widely publicized recently concerns the control of handguns. As a Federal judge you will be hearing cases involving the commission of crimes where handguns have been used. Would you please tell the committee what, in your opinion, can be done to restrict the criminal use of handguns and at the same time protect the constitutional rights of law-abiding citizens?

Mr. RYAN. That is a pretty heavy question, Senator. I think to start with I would say the police powers are with the States, and much of that policy I feel should be regulated by our States. I do feel from the judiciary's standpoint that where a handgun or a firearm is being used in commission of a felony, that I would certainly follow the principle that heavier penalties should be meted out than——

The CHAIRMAN. Than what? I could not hear you.

Mr. RYAN. In a penalty, felony situation, if handguns were used I think it makes the entire charge that much more serious and the penalty should be that much more severe. Generally speaking, I think every case has to be handled or would have to be handled on its own merits and on its own facts from a specific standpoint.

I would not attempt to give you what would be the answer to your question. I do not believe I have that wisdom. That is a question that gets into, do I have an answer to that, and I do not believe that a lot of the smartest people in this country have really found the answer to that. I believe it has been debated in this room today prior to this hearing.

The CHAIRMAN. For your information, I have introduced a bill that would provide a prison sentence for a person who uses a gun in the commission of a crime, and for the second offense it is a much more severe sentence, the second offense and thereafter. I prefer that method of approach rather than trying to take guns away from the people. The criminals are still going to get guns and I think people have to have guns in their homes to protect themselves.

Mr. Ryan, would you explain to the committee how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern.

Mr. RYAN. Mr. Chairman, I assume that goes to my business interests and my partners and some of the clients that I have represented as an attorney. It will be my position, and I feel it should continue to be my position that I would not accept or handle a case if it concerned a client that I had represented or if it is a party that I have a financial interest in.

I do have a number of investments in Idaho. I think it would be very rare for these people to ever be involved in the Federal court. I do not know that they ever have been to date.

I have two partners whose cases I would not hear at all. I am quite close to them, and there are one or two other attorneys in our State that I am so close to that I would not hear their cases because I would feel I had a conflict.

In Idaho this has been handled and can be handled rather easily. The cases are handed out by lot and if a judge draws a case that he has a conflict with, he merely turns it back to the clerk and is handed another file, and that file is then handed to another judge to handle. I do not think it will be a problem.

The CHAIRMAN. Mr. Ryan, where in your view does a conscientious judge draw the line between judicial decisionmaking and legislative decisionmaking? Further, what are the criteria that you would consider in resolving whether or not a decision was the type that ought to be made by a judge as opposed to an elected legislative body?

Mr. RYAN. Well, that covers a little bit of the first question you asked me. In some instances there would be a very clear line, if I felt that it was in the area of public policy. I am not an advocate of judicial activism whatsoever. I do not believe in the courts getting into the political thicket or legislating by judicial fiat.

However, I have noticed and observed that sometimes even Congress itself enacts statutes painted with a pretty broad brush, and I think it leaves the judiciary sometimes in a dilemma and almost an invitation to exercise what would be judicial fiat, legislation by that. It is given to them by statute and it is a little bit serious.

I would be very reluctant, very restrained to venture into this sort of thing. I feel the court at all times should act with restraint in these areas. Having observed the Idaho Federal District Court close-up for some 30 years, the history of that court is that they do show judicial restraint and I would hope to follow that historical pattern.

The CHAIRMAN. Mr. Ryan, when you were in the Idaho State Legislature I believe you served as chairman of a joint Senate-House committee charged with studying court reform. After a 2-year study, the committee proposed a complete court reform package which later became law.

In your opinion, was this a successful program, and what if any changes would you recommend today?

Mr. RYAN. Senator, it was a very successful program. I am very proud of the job that we did accomplish. I did not accomplish it alone by any means. I was merely chairman of that committee but in our report back to the legislature we recommended a complete new structure for the court system in Idaho by eliminating two autonomous lower courts, the justice of the peace, and the probate courts.

After I went out of the legislature I was asked to go on the Idaho State Bar Commission, I think mostly for the specific purpose of lobbying our court reform bill through our Idaho Legislature, and we did do that successfully. It is now in place and it is working very well. Really, I do not believe there are any changes that need to be made now. It is an excellent package and looked to by many other States as one of the best structures for a State court system that we have in our country. We are very proud of it.

The CHAIRMAN. I believe you mentioned judicial activism, and I believe you stated you do not favor judicial activism. I presume you mean by that the judicial branch usurping the authority of the legislative branch of the Government——

Mr. RYAN. Yes, absolutely. That is exactly what I mean.

The CHAIRMAN [continuing]. Or the executive branch, as the case may be. In other words, you would not favor the judicial branch assuming responsibilities not delegated to it under the Constitution.

Mr. RYAN. Precisely correct, Senator.

The CHAIRMAN. Without objection, a biography of Mr. Ryan will be placed in the record.

Mr. Ryan, that is all the questions. Thank you very much for your appearance, and we wish you well on the bench.

Mr. RYAN. Thank you, Senator.

The CHAIRMAN. Now we will take the testimony of Mr. David L. Russell, if you will come around, Mr. Russell.

Mr. Russell, do you have any members of your family here.

Mr. RUSSELL. No, sir. My wife is home with our little 5-year-old. She could not make it.

TESTIMONY OF DAVID L. RUSSELL, U.S. DISTRICT JUDGE, EASTERN, WESTERN, AND NORTHERN DISTRICTS OF OKLAHOMA

The CHAIRMAN. Mr. Russell, this committee just confirmed you on June 10 of this year, I believe, for the position of U.S. attorney for the Western District of Oklahoma. However, you did previously serve in that same position from 1975 until 1977, didn't you?

Mr. RUSSELL. Yes, sir.

The CHAIRMAN. Do you think the experience you have gained as a U.S. attorney will help you in performing the duties of a district court judge, and if so, how?

Mr. RUSSELL. Yes, sir, I do, in several ways. First, having been U.S. attorney twice, just from the standpoint of working with the judges and the courts on a daily basis, it certainly has made me familiar with the workings of the courts.

Second, I believe as U.S. attorney, working in the executive branch, and having previously worked in the legislative branch, it gives me even a greater appreciation, perhaps, of the necessity of our separation of powers and our tripartite system.

Yes, sir, I do.

The CHAIRMAN. Mr. Russell, you have been nominated for U.S. district judge for the Northern, Eastern, and Western Districts of Oklahoma. I believe there are only three districts in Oklahoma, so this is somewhat unusual in that you will be required to cover the entire State. Is that right?

Mr. RUSSELL. Yes, sir.

The CHAIRMAN. Will you please tell the committee what criteria you will use in determining how you will allocate your time between these districts?

Mr. RUSSELL. This really is not a problem, Senator. The way the courts in the State have previously allocated the judge's resources, my predecessor, Judge Dougherty, has spent 99 percent of his time in Oklahoma City, which is the western district. The reason he is able to do that is because there are sufficient judges now in Tulsa and in Muskogee, the other two districts. However, he is available in any instance where they call him, and I would also be available if that should arise but it has not arisen often.

The CHAIRMAN. Mr. Russell, how familiar are you with the case load which awaits you, and what recommendations, if any, do you have for improving the disposition of these cases?

Mr. RUSSELL. Mr. Chairman, we have a large case load, and I guess I have been responsible, as U.S. attorney, for some of that case load. We have been prosecuting county commissioners. We do have a large case load but, it is my understanding, not a significant backlog. We have been fortunate to be able to push our cases to disposition at a fairly rapid rate, so I do not think that is a problem.

The CHAIRMAN. Mr. Russell, what are the standards that you will use in deciding that your court has a continuing administrative responsibility to oversee the implementation of one of its orders?

Mr. RUSSELL. Well, if I could just state my philosophy generally, it would be that judges are judges and they are not administrators. Therefore, I would think it would be an unusual instance when I would have to serve as an administrator, and hope that would not arise.

The CHAIRMAN. Mr. Russell, where there is a conflict between your own conscience or feeling or sense of justice and the clear meaning of a statutory or constitutional provision, how would you resolve such a conflict?

Mr. RUSSELL. Senator, when and if I am able to take the oath of office as a judge, I swear to uphold the laws and the Constitution, and that is what I would have to use as my guideline. I would follow the law, whatever that is.

The CHAIRMAN. Now I would like to get your feeling on the question of judicial activism.

Mr. RUSSELL. Senator, as I mentioned earlier, I have worked in both the legislative and the executive branches of Government, and now possibly in the judicial branch, and as a result I have gained a real appreciation for the separation of powers. I am not a judicial activist; I do not support that. I believe in each branch fulfilling its own function, and I do not think that is one of the functions of the judiciary.

The CHAIRMAN. Without objection, a copy of your biography will be placed in the record as part of your testimony.

I believe that is all the questions I have. We thank you for your appearance here, and we wish you a long and happy service on the bench.

Mr. RUSSELL. Thank you, Senator.

The CHAIRMAN. Now, Mr. Archer, will you come around?

Mr. Archer, do you have any of your family with you? I believe you have already introduced your wife.

Mr. ARCHER. Mr. Chairman, Senator Warner introduced my wife, Vera, who is here today and my daughter Sharon. Thank you.

TESTIMONY OF GLENN L. ARCHER, JR., NOMINEE, ASSISTANT ATTORNEY GENERAL, TAX DIVISION, U.S. DEPARTMENT OF JUSTICE

The CHAIRMAN. Mr. Archer, the primary functions of the Tax Division are to aid the Internal Revenue Service in collecting the

Federal revenue and to establish principles of law which will serve as guidelines to taxpayers and their representatives as well as to the Internal Revenue Service.

The Tax Division usually works closely with the Chief Counsel of the Internal Revenue Service in deciding which tax cases to bring. How do you see the relationship between the Tax Division and the Internal Revenus Service in this area of litigation policy?

Mr. ARCHER. Mr. Chairman, I fully subscribe to very close cooperation with the Chief Counsel of the Internal Revenue Service and the Assistant Secretary of the Treasury and the Commissioner in deciding which cases to bring and prosecute on behalf of the Government. I look forward to a very close working relationship with these people and I hope that we will be able to bring a sense of good tax administration to this country during the next few years.

The CHAIRMAN. Mr. Archer, the Criminal Investigation Division of the Internal Revenue Service has, over the years, done a commendable job in the effort to deter criminal activity, particularly in the area of organized crime, white collar crime, and narcotics trafficking. I am concerned, however, that insufficient assistance and support is provided to special agents of the Criminal Investigation Division. Would you please give me your comments on what you see as the role and importance of the criminal investigators of the Internal Revenue Service and their contribution to your Division?

Mr. ARCHER. The Criminal Investigation Division of the Internal Revenue Service of course is very important to this country. The criminal tax laws are designed to enforce voluntary compliance with our tax laws. In my mind, the voluntary compliance has in some respects deteriorated in the last few years, so I think it is highly important that the Criminal Investigation Division be given full support by the Department of Justice attorneys in the criminal tax area particularly.

Internal Revenue Service CID agents also perform a very important function in the organized crime and narcotics area. The Tax Division is very mindful that it can be of assistance in these areas. There are many instances in which it is very difficult to prosecute narcotics traffickers for drug offenses, and the traditional pattern is that they also do not report their income taxes, so that the income tax criminal statutes are important in helping to control the narcotics trafficking in this country.

We in the Tax Division look forward to working in this area, and in fact are doing so now, from my brief experience in the Division.

The CHAIRMAN. I presume you would be supportive of the various operations the Justice Department carries on in order to detect crime and punish crime in every way possible?

Mr. ARCHER. Yes, I would, Senator, very much indeed.

The CHAIRMAN. You would cooperate with the Internal Revenue Service in every way you could to accomplish this and to prevent more crime?

Mr. ARCHER. This is a very important area in the Justice Department right now, and we in the Tax Division fully, and I would also fully, support the efforts of the Department of Justice.

The CHAIRMAN. I have been informed that there are numerous potential criminal tax investigations being ignored or being held in abeyance due to a lack of sufficient investigative manpower. What, if anything, can you do to assist in correcting this situation?

Mr. ARCHER. Mr. Chairman, there is of course somewhat of a manpower shortage, with the budget restraints that are being placed on some parts of the Internal Revenue Service as well as some parts of the Justice Department. However, I think that there may be other areas where the problem is more serious, and that is in the ability of the agents of the Criminal Investigation Division to be able to fully conduct their criminal investigations. They are being stymied now by some restrictive bars in the summons area, and they are not able to complete their investigations, in which case many of them are referred to the Department of Justice Tax Division, which then has to empanel a grand jury to carry out investigative functions which should really be handled in the administrative summons manner.

There is legislation being sponsored right now, Mr. Chairman, by the Attorney General, which would amend the summons enforcement provisions of the Internal Revenue Code. If these legislative changes are adopted they would help significantly in being able to conduct administrative investigations of criminal tax offenses.

The CHAIRMAN. Mr. Archer, about 3 years ago I chaired hearings on the subject of the erosion of law enforcement intelligence operations and its impact on the public security. I was informed by the Internal Revenue Service that due to certain restrictions imposed on them by the Tax Reform Act of 1976, that they were unable to disclose possible Federal violations of the law even to other U.S. Government agencies.

I was provided at that time with a list of 42 cases which were not disclosed to proper authorities, primarily because the information was obtained from the taxpayer or the taxpayer's records. Among those alleged violations were 5 cases of possible bribery of Federal officials, 3 cases of customs violations, 15 cases of illegal political contributions, 3 cases of immigration and naturalization law violations, 3 cases of fraudulent use of the mail, 6 securities law violations, and several other miscellaneous crimes including Firearms Act violations, bank foreclosure violations, conspiracy to violate the Taft-Hartley laws, and so forth.

I have been informed that actions have been taken to remedy to some degree the situation that existed at that time. However, I have also been told that the procedures are cumbersome and ineffective in many cases. There are still violations that are not being reported to the proper agencies.

I know that you are not, at this time, fully aware of all of these problems. However, I would appreciate your views on this subject and would like for you to look into this matter and provide me with a followup report at a later date. Do you think you could do that?

Mr. ARCHER. Yes, I will try to do that, Senator. It is a serious problem and has been since the 1976 tax legislation, which restricted quite severely disclosure of tax returns and tax return information. The Attorney General at the present time has proposed legislation which would relax section 6103 of the Internal Revenue Code in some respects, in order that some of these non-tax-related crimes that are discovered can be disclosed in particular to the Criminal Division of the Justice Department.

The CHAIRMAN. Where the Justice Department has the authority to act and they have the flexibility to do so, of course they can take those steps but if changes are needed in the statute in order to assist the common good in these matters that are so vital to the public, then if you people will let us know we will try to get those changes through.

Mr. ARCHER. There is legislation, I believe, that has been introduced. I do not know the bill number right offhand. There are criminal penalties now imposed for violating the nondisclosure rules, so that the Internal Revenue Service has been very careful not to disclose tax return or taxpayer information because of these criminal laws that are involved. There is legislation to effect some relaxing of these rules in the process right now, and I think it would help to solve some of the problems that you have alluded to.

[A letter relating to disclosure of information follows:]

U.S. Department of Justice

Tax Division

Assistant Attorney General

Washington, D.C. 20530

JAN 27 1982

Honorable Strom Thurmond
Chairman, Committee on the
  Judiciary
United States Senate
Washington, D. C.

Dear Mr. Chairman:

During the course of my recent confirmation hearing, you asked me to look into, and provide you with a follow-up report on, obstacles to the disclosure of information by the Internal Revenue Service about violations of Federal law. You recognized that the problems were caused by restrictions enacted by the Tax Reform Act of 1976, and I mentioned that the Administration has recently proposed legislation generally dealing with the 1976 tax disclosure restrictions in the context of nontax criminal law enforcement. I am enclosing for your information a copy of the Administration's bill (S. 1891) and of the section-by-section analysis.

I should preface my comments by noting that the particular statutory provision at issue, 26 U.S.C., Sec. 6103(i)(3), does not affect the disclosure of tax information to the Department in connection with cases for which the Tax Division is responsible. */ Instead, its primary impact is on offenses for which the Criminal Division is responsible. For that reason, I have consulted with the Criminal Division in the preparation of this report.

Prior to enactment of the Tax Reform Act of 1976, tax returns were freely available to Department of Justice attorneys and to personnel of other agencies for use in connection with their official duties. The 94th Congress decided that returns and related information had been too freely available to Government agencies, and that legislation was needed to protect more fully the confidentiality of such information and to restrict disclosure except under detailed procedures delineated by the Congress. Thus, 26 U.S.C., Sec. 6103 was extensively revised, effective January 1, 1977, and new procedures for access to and use of information for nontax criminal purposes were established in 26 U.S.C., Section 6103(i).

The statutory procedures provide three avenues by which the Service can disclose information to the Department for nontax criminal purposes: court authorized disclosures, disclosures under a formal written request, and I.R.S. initiated disclosures. Under the statutory scheme, returns and other information provided to the Service by the taxpayer (or his representatives) are entitled to the highest degree of confidentiality. This category of information can be disclosed at the request of the Department only under specific criteria set out in the statute after obtaining a court order authorizing disclosure with the prior approval of an Assistant Attorney General. Information not reflected on a return or otherwise provided to I.R.S. by the taxpayer can be obtained at the request of the Department without securing a court order, but only after an Assistant Attorney General makes a formal written request for the information. Finally, the Service can initiate a disclosure to the Department of information indicating a violation of Federal criminal law. However, if the source of that information was the return or information provided by the taxpayer, the Service is prohibited from informing the Department of the violation. Your inquiry relates solely to this third avenue of access.

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*/ The rules concerning disclosure of information to the Department in connection with tax cases are contained in 26 U.S.C., Section 6103(h)(2) and (3).

As might be expected, there were some initial problems in administering the new statutory restrictions on the disclosure of tax information. Over an extended period of time, however, the Department and the Service engaged in a cooperative effort to resolve the administrative problems. The major resulting change was that the Service decentralized its handling of disclosure matters involving Section 6103(i), delegating to field officials the necessary authority to release the information. The result of that and other administrative changes is that the Service has responded much more quickly to Department initiated requests and the number of I.R.S. initiated disclosures has also increased.

The Department and the Service recently reexamined the policy considerations underlying the present restrictions on I.R.S. initiated disclosures of violations of Federal criminal laws in connection with drafting the Administration's tax disclosure legislation. The conflicting policy considerations involve taxpayers' expectations of privacy; the needs of law enforcement; and the Service's necessary access to taxpayer-provided information for tax administration purposes.

In attempting to balance these competing interests, the Administration ultimately decided not to request wholesale changes in the current rules relating to I.R.S. initiated disclosures. The according of confidentiality to tax returns, except when a court order is obtained, recognizes not only taxpayers' expectations of privacy, but also serves to encourage (or at the very least not to discourage) the reporting of income from whatever source derived. Moreover, in connection with the auditing of tax returns, it is critical that to the greatest extent possible taxpayers voluntarily, quickly, and informally provide the Service with access to their books, records and other relevant information. We are convinced that the Service's access to taxpayer-provided information would be impeded under a broadly drafted statutory scheme in which the Service was generally permitted (or required) to make immediate disclosure of every violation of Federal criminal law encountered during the course of examining such material. Consequently, the Administration's tax disclosure legislative proposal would not make dramatic changes in this aspect of current law.

The legislation does propose, however, to authorize disclosure by the Service of taxpayer-provided information (other than the return or information contained on the return) of a corporation or other legal entity where the Service has reasonable cause to believe that the organization was formed or is being operatedor maintained with a purpose of facilitating or engaging in federal criminal activity. While this provision is relatively narrow and, accordingly, should be of no concern to all but a few taxpayers, its enactment would facilitate our access to information where sham corporations are used to facilitate criminal activities. In addition, the legislation would direct the Service to make self-initiated disclosures of criminal violations. The authority to make such disclosures is currently discretionary.

I hope that you will find this report helpful and would be pleased to provide you with any further information that you may need concerning this matter. The Administration has given an extremely high priority to the enactment of its tax disclosure legislation and would appreciate your support in this endeavor.

Sincerely yours,

GLENN L. ARCHER, JR.
Assistant Attorney General
Tax Division

The **Chairman**. Mr. Archer, there is always a backlog of tax collection cases in the Tax Division. Do you see collection cases being given a greater priority in order to assist in alleviating this problem?

Mr. **Archer**. This is one of the areas that the administration is looking into, that is, debt collection, and the Tax Division obviously has debts that it needs to collect. This would be one of the areas in which I would devote attention, to see if we can do a better job than we have in the past.

The **Chairman**. Mr. Archer, I believe you have been working in the Tax Division as a Special Assistant to the Attorney General since the first part of October.

Mr. **Archer**. That is correct.

The **Chairman**. At this point, what do you see as the main areas of concern in the Division, and how will you attempt to respond to these areas of concern?

Mr. **Archer**. There are several concerns. One, of course, is being able to effectively do our job with the budget restraints. We have to look to better ways to carry on our functions within the Tax Division. Approximately 250 or 260 lawyers are responsible for representing the Government, supervising the handling of nearly 15,000 cases per year. It is a large job, and we need to handle it in the most efficient and effective way that we can.

There are specific areas which we have talked about previously, like the administration's concern about debt collection, and criminal activities, which I will be giving special attention to.

The **Chairman**. Mr. Archer, I think that completes my questions. Without objection, we will place a biography of you in the record.

We hope you enjoy your work in the Justice Department and wish you success with it.

Mr. **Archer**. Thank you very much, Mr. Chairman.

The **Chairman**. I believe this completes the hearing today. The committee now stands adjourned.

[Whereupon, at 1:40 p.m, the committee recessed, to reconvene at the call of the Chair.]

[The following was received for the record:]

BIOGRAPHIES

HAROLD L. RYAN

NOMINEE, U.S. DISTRICT JUDGE, DISTRICT OF IDAHO

Birth: June 17, 1923, Weiser, Idaho.

Marital status: Married to Ann Dagres, three children.

Education: 1941-43—University of Idaho; 1943-44—University of Washington; 1944—University of Notre Dame; 1946-50—University of Idaho, LL.B. degree.

Bar: 1950—Idaho.

Military service: 1943-46—U.S. Navy.

Experience: 1950-61—Ryan & Ryan, Weiser, Idaho; 1951-52—part time prosecuting attorney, Washington County, Idaho; 1961-71—Ryan & Speropulos, Weiser; 1971-78—Ryan & Sweet, Weiser; 1978 to present—Ryan, Sweet & Masingill, Weiser, Idaho.

DAVID L. RUSSELL

NOMINEE, U.S. DISTRICT JUDGE, EASTERN, WESTERN AND NORTHERN DISTRICT OF OKLAHOMA

Birth: July 7, 1942, Sapulpa, Okla.

Legal residence: Oklahoma.

Marital status: Married to Dana Jane Russell, two children.

Education: 1959-62—Oklahoma Baptist University, B.S. degree; 1962-65—University of Oklahoma, J.D. degree.

Bar: 1965—Oklahoma.

Military service: 1965-68—U.S. Navy, JAG.

Experience: 1968-69—Assistant Attorney General, State of Oklahoma; 1969-71—Legal advisor to Governor Dewey F. Bartlett; 1971-73—Blankenship, Herrold, Russell & Leonard, partner; 1973-75—Chief legislative assistant to Senator Dewey F. Bartlett; 1975-77—U.S. attorney, Western District of Oklahoma; 1977-81—Benefield, Russell & Freede, partner; June 1981 to present—U.S. attorney, Western District of Oklahoma.

GLENN L. ARCHER, JR.

NOMINEE, ASSISTANT ATTORNEY GENERAL, TAX DIVISION, DEPARTMENT OF JUSTICE

Birth: March 21, 1929, Densmore, Kans.

Legal residence: Virginia.

Marital status: Married to Vera Wiseman Archer, four children.

Education: 1947-51—Yale University, B.A. degree; 1951-54—George Washington University Law School, J.D. degree with honors.

Bar: 1972—District of Columbia Bar; 1954—U.S. District Court, Dist. of Columbia.

Military service: 1954-56—U.S. Air Force.

Experience: 1956 to present—Hamel, Park, McCabe & Saunders, Washington, D.C., associate (1956-60), partner (1960 to present).

CONFIRMATION HEARING ON STANLEY S. HARRIS

MONDAY, DECEMBER 14, 1981

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 2:05 p.m., in room 2228, Dirksen Senate Office Building, Hon. Strom Thurmond (chairman of the committee) presiding.

Present: Senators Thurmond and Mathias.

Staff present: Duke Short, chief investigator; and Pamela Swanner, clerk.

NOMINATION OF STANLEY S. HARRIS

The **CHAIRMAN**. The committee will come to order.

Our hearing today is on Stanley S. Harris, of Maryland, to be U.S. attorney for the District of Columbia.

Please come forward, Judge Harris, and hold up your hand and be sworn. Do you swear that the testimony you will give in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

Judge **HARRIS**. I do.

TESTIMONY OF STANLEY S. HARRIS, NOMINEE, U.S. ATTORNEY, DISTRICT OF COLUMBIA

The **CHAIRMAN**. Judge, do you have members of your family here you would like to introduce?

Judge **HARRIS**. No, sir.

The **CHAIRMAN**. I believe you are an unusual citizen here; you were born in Washington, D.C., were you not?

Judge **HARRIS**. That is correct, sir.

The **CHAIRMAN**. Most people come here from other places.

You have a wife and three children. You have a B.S. from the University of Virginia and an LL.B. from the University of Virginia. You were admitted to the District of Columbia Bar in 1953. You served 2 years in the Army from 1945 to 1947, right after World War II.

Judge **HARRIS**. That is correct.

The **CHAIRMAN**. Since then, you have been with Hogan & Hartson, judge in the Superior Court of the District of Columbia, and judge in the District of Columbia Court of Appeals.

Judge, you have been a sitting judge in the District of Columbia for about 10 years. That is the highest trial court in the District of Columbia, is it not?

Judge HARRIS. I was on the trial court for about a year and a half and then on the court of appeals.

The CHAIRMAN. And then the court of appeals, which is an appellate court; you served on both. You are now on the appellate court?

Judge HARRIS. On the District of Columbia Court of Appeals, which is by statute the highest court of the jurisdiction.

The CHAIRMAN. With your background, I would like to have your comments and opinions on several issues of interest, such as the District of Columbia bail law.

Judge HARRIS. Well, of course that is quite a broad subject. We basically have two bail laws here. We have on the Federal side the Bail Reform Act, which I think is being looked at very closely with the idea of attempting to make some improvements in the way in which it functions.

We have the District of Columbia Code provisions for pretrial release of defendants. I think that at the present time it is a statute which is preferable to the Federal Bail Reform Act. I would hope that some changes could be made in the Bail Reform Act to achieve a better balancing between a defendant's rights and the rights of the community.

There is a very real perception in the community that the laws are somewhat skewed in favor of the defendants, and there is considerable concern about the revolving door aspect of those who are released so soon after having been arrested and rearrested.

The CHAIRMAN. I introduced a bill to change the bail law. In other words, the way it is now in the federal system, we not only consider the bail necessary to insure the defendant's presence at trial, but I feel the judge should be allowed to consider the danger to the community as well. How do you feel about that?

Judge HARRIS. I share your concern and your conclusion.

The CHAIRMAN. Some of these people who are repeaters, when they are arrested, if they are able to put up the bail, get right out and commit another crime, maybe several crimes, before they are even tried for the offense for which they were arrested. I have been very concerned about that.

How do you feel about the exclusionary rule? That is another thing I have introduced a bill on.

Judge HARRIS. I would like very much to see changes in the exclusionary rule. Fred Graham, who was then covering the Supreme Court for the New York Times, wrote a book some years ago called the Self-Inflicted Wound, which dealt with the manner in which the administration of the criminal justice system had deteriorated into an awful lot of technicalities.

I fear the exclusionary rule is miring down the courts. While certainly constitutional rights have to be thoroughly guarded, there is a very real question in my mind as to the extent to which the exclusionary rule as it is presently applied strikes as good a balance as it should.

Forgive me, but I am not that familiar with the bill which you have introduced, but I would hope that we could either have a good-faith exception to the exclusionary rule or the possibility of civil liability if officers do violate a citizen's constitutional rights in the process of making a search or seizure.

The CHAIRMAN. If a policeman makes a mistake, he can be tried for that or such action taken as may be required, but I have not felt that that should be any reason to let a defendant go when you have evidence that shows guilt.

Judge HARRIS. That is a very valid point.

The CHAIRMAN. I have also introduced another bill for the death penalty. We have passed it through the committee, and it is on the calendar of the Senate now to come up in the new year.

You do not have a death penalty now in the District either. The man who shot President Reagan, the Press Secretary, the Secret Service officer, and the policeman—if he killed all those people, you could not get a conviction on anything but a life sentence. The jury, of course, would have to pass on the question as to whether he was guilty at all and then whether it should be life or death.

It has been my experience as a lawyer and as a trial judge in South Carolina that the death penalty does tend to discourage serious crimes. I just wonder if you have any opinion on that.

Judge HARRIS. It certainly is a fascinating debate as to whether the death penalty does or does not act as a deterrent to crime. I am unpersuaded by those who advocate that it is not a deterrent. Of course it is difficult to find hard evidence to the contrary. On balance, I tend to think it would be a meaningful deterrent.

The CHAIRMAN. Another question I was interested in concerned habeas corpus. Sometimes now these people charged with crimes wait 8 or 10 years in bringing a habeas corpus and get out on a technicality. Do you have any feeling on that subject?

Judge HARRIS. We do not have as much of a problem here in this jurisdiction as, I think, exists in the States. Certainly if a prisoner's constitutional rights have been or are being violated, there has to be real concern as to that consideration. On the other hand, it seems to me that there certainly needs to be a meaningful degree of finality in the criminal justice system.

I believe there was a case recently in which the U.S. Court of Appeals here set aside a conviction some 17 years after the conviction had been brought in by the jury on the grounds that the instructions which had been given at the time of trial were defective. I think that is very difficult for the public to understand, and it is very troublesome to me as a judge.

The CHAIRMAN. I believe we have a bill now to limit it to 3 years if there is any action to be taken. Does that appear to be a reasonable time?

Judge HARRIS. I must confess, I have not really thought that through enough to have a meaningful opinion on it, Senator; I am sorry. But as a practical matter it certainly has great charm.

The CHAIRMAN. Have you had a chance to go into any of this work we are doing on the Federal Criminal Code? We have passed a bill now through the Senate. Last year we passed it through the Senate, too. It went to the House and died there. Again we have sent it to the Senate floor for action, and I hope it will come up in the new year. It is to bring about a consolidated Federal Criminal Code—to have all the criminal laws in one code, modernize it, and bring it up to date. Some of these laws are very antiquated. Have you had occasion to look into that any?

Judge HARRIS. I have not. I think it would be a very constructive step, one that should be taken, and one that I hope can be taken soon. But our present court system functions, as you know, under the District of Columbia Code, not under the Federal Criminal Code, and I simply have not studied the issue very well.

The CHAIRMAN. Judge, on another subject, the U.S. attorney for the District of Columbia has traditionally been viewed as probably the most important in the country, because he is in a position to set the prosecution policy in a way for the entire Federal Government.

Do you see the District of Columbia office taking a leadership position in Federal prosecution policy?

Judge HARRIS. I would think so, Senator. I think it traditionally has. The office which I soon will be heading, if I am to be confirmed, has an outstanding reputation throughout the country and a well-deserved outstanding reputation.

I think it has the personnel to exert a leadership role, and I think the ability to do that is enhanced by the geographical closeness of this office with the Department of Justice, which permits the coordination of policy so effectively.

For example, I believe that the administration wishes to take an active step in attempting to curb food stamp fraud, and I think the U.S. attorney's office here is in a position to work very effectively with the Department of Justice in that sort of endeavor.

The CHAIRMAN. I just wonder how it is going to feel, after having been a trial judge and appellate judge, to step down now and become a prosecuting attorney.

Judge HARRIS. I perhaps ought to ask you that, sir. You have stepped down once that way; I never have. But I am looking forward to it. I think it will be a fascinating challenge and a very interesting period.

The CHAIRMAN. I think it will be a great challenge to you, and I am sure you were selected because of your fine record and your reputation for integrity, dedication, and abilities. I do not believe I have any other questions.

Senator Mathias is here.

Senator Mathias, do you have some questions?

STATEMENT OF HON. CHARLES McC. MATHIAS, JR., A U.S. SENATOR FROM THE STATE OF MARYLAND

Senator MATHIAS. Thank you very much, Mr. Chairman.

What I principally want to do is congratulate Judge Harris on his nomination by the President. His nomination is evidence of the high regard in which he is held and as evidence of his reputation at the bar and in the community for which he has been chosen for this rather difficult task.

I agree with the chairman, that this is not without some difficulty, stepping down from the bench. Therefore, I think you are to be all the more congratulated, for having been willing to make what will be viewed by many people in the public as a substantial sacrifice in order to take on an arduous job, one which no one pretends is going to be easy.

I notice in your biography that you have joined various clubs, associations, and organizations. I recall having on occasion visited the Barristers. This shows that there is a lighter side to your professional activities, which I think is a good sign.

What about the level of crime? Are you concerned by the present volume of violent crime?

Judge HARRIS. I certainly am. It is a terribly distressing circumstance. The level we are experiencing is frightening, and coming to grips with it is a most difficult problem. I do not know any answers at this point. I do not know whether anybody can do much more than put a dent in it and try to cope with it.

When you are looking at the level of drug dealing and drug usage that we have here, it is obviously a major contributing factor. It is a very distressing thing.

Senator MATHIAS. One of the deep concerns that I have is drug traffic and the fact that we have not been able to get on top of it. Will that be one of your areas of concentration?

Judge HARRIS. It certainly will, sir.

Senator MATHIAS. I am encouraged to hear that. Nothing is more important. Nothing is more dangerous, from the overall point of view of the security of society, than to have large numbers of young people whose lives are ruined by drug pushers and others who attract them to these very dangerous practices, dangerous to themselves and dangerous to society.

Unfortunately, the overall Department of Justice budget is going to be reduced. We will see a reduction in the immediate future and presumably other reductions in the longer-range future. This could have some impact on the Department's ability to combat drug traffic and drug-related offenses.

So your position on the front line will be an extremely important one, because the back-up which has been there may not be there, at least to the same degree, in the days ahead.

Judge HARRIS. Of course, there also will be a cutback in the Drug Enforcement Administration's budget, which will contribute to what you are talking about.

I would hope that an enhanced and ever continuing degree of cooperation between all of the law enforcement agencies—if that can be made more and more effective, perhaps that can be compensated for.

Senator MATHIAS. It is, I believe, the consensus of most metropolitan chiefs of police that some form of gun control would be helpful in dealing with violent crime in cities. Do you have any view on that subject?

Judge HARRIS. I have not studied it a great deal. Here in the District of Columbia we have the most rigid gun control law in the Nation, and we still have a distressingly high crime rate.

Perhaps if we could start this country all over again and avoid having the number of guns that we have around, we could get somewhere very effectively, but the quantity of guns that we now have is rather staggering and frightening.

Senator MATHIAS. This is a subject that this committee is considering right now. We are holding oversight hearings on present firearms laws. After the first of January we will hold some hearings on additional proposals dealing with handguns. As you develop greater experience and some personal philosophy on the subject, we would appreciate your guidance and advice.

Judge **Harris**. Very well, sir.

Senator **Mathias**. We talk about a high level of crime in the District of Columbia. Unfortunately, we cannot claim that is because there is inadequate policing. We have a large metropolitan police force, there is the Executive Protective Service, there are the Park Police, there are the Capitol Police, and several other law enforcement agencies in the District. You may have occasion to deal with all of them. Have you thought of ways in which you would coordinate the activities of these various police services?

Judge **Harris**. I have not, sir, and the reason I have not is simply a lack of exposure to that aspect of the criminal justice process. That is one area in which my learning process will be heavily concentrated, but as of now I have not had much contact with the law enforcement bodies such as the ones you have mentioned.

Senator **Mathias**. A similar problem will be that of coordination between the various jurisdictions in the metropolitan area. As the chief prosecuting officer for the District of Columbia, you will obviously be in a very central position as far as law enforcement and prosecution for crime is concerned.

We do witness the phenomenon of Beltway crime throughout the area. As a resident of Bethesda, Md., you know that Western Avenue is not an impregnable wall which keeps criminals either inside or outside the District of Columbia. They flow from Maryland into the District and from the District into Maryland, and they can go back and forth a dozen times a night.

So your efforts within the District alone will not be as effective, I suspect, as your efforts at coordination with your colleagues in Montgomery County, Prince George's County, and your colleagues in northern Virginia. I am wondering if you had an opportunity to think about what means of coordination you would have dealing with those jurisdictions.

Judge **Harris**. I think it is a very important thing to do. The job for which I have been nominated, of course, is unique in that you have both the Federal and the local prosecutorial responsibilities.

I have already set up a meeting with the U.S. attorney for Maryland and the U.S. attorney for the Eastern District of Virginia, for us to get together and talk about the problem. We plan to meet regularly, and I think that the same thing should be done with respect to the State prosecutors in the adjacent counties.

Senator **Mathias**. I would certainly urge that you do that—that you talk to the State's attorney in each of the adjacent counties.

Judge **Harris**. I definitely intend to.

Senator **Mathias**. I am encouraged by the fact that you have already taken that step with respect to the U.S. attorney and that you plan to do it with the State officials.

Another area I would hope you would look at very carefully is the area of juvenile crime, which is such a sensitive area and such an important area. It has been reported, according to the FBI figures, that about 20 percent of our violent crimes are the result of juvenile activities.

At the same time, the only hope of avoiding hardened mature, adult, graduated criminals is to grab juveniles at an early enough stage that they are still redeemable. It is a very close question of judgment sometimes as to whether or not you can in fact rehabilitate a given individual.

I wonder if you have given any particular thought as to how you will handle the juvenile programs, particularly again since it appears that there will be some effort on the part of the Federal Government to reduce its level of support for juvenile programs.

Judge Harris. We were talking a moment ago about the need for coordinating the U.S. attorney's office's activities with the prosecutors in the surrounding counties. The basic responsibility for prosecuting juvenile crime lies with the Corporation Counsel's Office of the District of Columbia. Of course I will be working very closely with them on that.

The only juveniles that are subject to prosecution by the U.S. attorney's office here are those who are 16 and 17 who commit certain specified offenses, such as rape, armed robbery, and burglary. I fear our record of rehabilitation for the hard-core juvenile offenders is distressingly low.

Senator Mathias. Of course your role is limited at the 16-year-old level, but I think your influence and your interest in dealing with the programs that are maintained and carried out successfully below that level—and they tend to be more successful below that level. The older these kids get, the more education in crime they get, the tougher they are, and the less likely it is you will be successful in rehabilitating them. So your interest in really keeping down that particular volume of business, by maintaining some adequate juvenile programs, looking to identify the troublemakers early and dealing with them early will be extremely important.

So it comes down again to a question of coordination between your office and the other agencies within the District that will handle those particular problems.

Judge Harris. I think you have expressed your concern very well. Certainly, any juvenile offender who can be prevented from becoming an adult offender is a real plus to the whole community.

Senator Mathias. That is right. It is not only a headache for you—another case to prosecute, another prisoner to house—but it is also a cost to society—the crime that will bring that particular individual into the court and into the prison.

I have just one final question. I am wondering how you feel about repeat offender programs.

Judge Harris. I am not sure I understand what you mean by the question. Do you mean legislation that would provide for enhanced penalties for repeat offenders.

Senator Mathias. Well, programs which, for example, could deal with the hardened individual criminals who are the repeat offenders, whose trials for subsequent offenses can be accelerated, whose prosecution can be dealt with on a different basis from that of, say, a first-time offender?

Judge Harris. I think the chronic offender, the offender who repeatedly endangers the community, is the type of person toward whom high resources must be directed.

Senator **MATHIAS**. But you have to have some program. What I am really talking about, I suppose, is prosecutorial management, so that you have a program by which a repeat offender shows up on the docket and is immediately recognized as a repeat offender. He can be moved right up to the head of the docket. He can be given the speediest possible trial. His opportunity for an extended period on bail, awaiting trail for his 14th offense, is limited, because under the repeat offender procedures he moves very rapidly to his day of judgment.

Judge **HARRIS**. The U.S. attorney's office has been developing a program to deal with what they refer to as the career criminal.

I might digress by saying I am a little troubled by the term, because I am not sure that it does not sound too good. I am wondering if perhaps a term like "chronic offender," that more accurately reflects how the person is viewed in the community, would be a better term.

The U.S. attorney's office program for dealing with those people has been developed. It is being improved all the time, and it is something I want to look at very closely, to see whether there is room for still greater improvement.

Senator **MATHIAS**. Again, I think your personal interest in it will be helpful, because I think no area of the administration of criminal law is more troublesome to the public. If you find some hardened criminal who has been convicted several times, out on bail and committing a still further offense while he is awaiting trial for some previous act, it just makes the whole system look inadequate, inefficient, and ineffective.

The career criminal program, the chronic offender program, the repeat offender program—whatever name we give it—is worth some trouble to analyze and make work. It really, I think, comes down to a question of management.

Judge **HARRIS**. I agree with your thoughts completely.

Senator **MATHIAS**. Thank you very much, Judge. Best wishes.

Judge **HARRIS**. Thank you, Senator. I appreciate your gracious comments.

Senator **MATHIAS**. I hope that you will not be so hard pressed that you cannot go to the meetings of the Barristers.

Judge **HARRIS**. Thank you, sir.

The **CHAIRMAN**. Judge, thank you very much. We wish you success in your work as U.S. attorney. It is a great challenge to you, and I am sure you will enjoy it.

Judge **HARRIS**. Thank you very much, Senator.

The **CHAIRMAN**. Mr. Ron Drake, would you come forward? Would you raise your hand and be sworn? Do you swear that the evidence you give in this hearing shall be the truth, the whole truth, and nothing but the truth, so help you God?

Mr. **DRAKE**. I do.

The **CHAIRMAN**. Mr. Drake, would you want to put your full statement in and just briefly summarize it, or do you want to present the whole statement?

Mr. **DRAKE**. I will try to briefly summarize the statement, if I may.

The **CHAIRMAN**. If you will just summarize it briefly, we will insert your prepared statement in full.

TESTIMONY OF RONALD L. DRAKE, PRESIDENT-ELECT, LOGAN CIRCLE COMMUNITY ASSOCIATION, WASHINGTON, D.C.

Mr. **Drake**. Thank you, Mr. Chairman.

I feel comfortable coming before this committee, since my wife served as a staff member a year ago with you, Mr. Chairman, and Senator Birch Bayh as he chaired the subcommittee looking into the Billy Carter-Libyan connection.

I have been friends with and close political allies with Senator Birch Bayh for the last 18 years and thus knowledgeable of the activities of this committee during those years.

I appear today as president-elect of the Logan Circle Community Association, which represents the downtown residential area. I would like, if I may, to acquaint you with some of the concerns of my community with the prosecutorial philosophy we wish to have reflected by the Office of the District Attorney for the District of Columbia.

Now more than any other time since we moved to the city 3 years ago, we find that our financial investments in our homes are in doubt and our secure access to our own streets, sidewalks, and parks are denied to us by a criminal element that asserts that it has a superior constitutionally-protected right to unfettered access to those same streets, sidewalks, and parks, while they aggressively deny to us that same right of secure and quiet enjoyment.

Our neighborhood, the Logan Circle area, is the center of unrestricted and open drug dealing and solicitation. Auto traffic is impeded at street intersections because of cars stopped in the middle of streets while the occupants consummate drug transactions with drug dealers.

Auto accidents are only narrowly averted in this drug-congested scene, because those of us who live in the neighborhood and use those same streets must stand aside and await the culmination of those illicit drug transactions.

We call for police intervention and are told that under the guidelines of the current district attorney's office a case will not be accepted for prosecution unless it meets a higher standard of proof than our traditional requirement of probable cause.

Rather, the current office has informed my community that a case will not be made unless the prosecutor is convinced beyond a reasonable doubt of the defendant's guilt, thus invading the province of judge and jury. Further, the current office now requires two police officers to make prostitution arrests.

We are advised by the police that we should not challenge these criminal intruders into our neighborhood because that invites their vengeance.

Many groups in our neighborhood, the Logan-Shaw community, black and white, affluent and poor, liberal and conservative, joined together in the past year in support of the passage by the District of Columbia City Council of legislation introduced by Councilman John Wilson designed to stop drug dealers from hawking their wares on our streets, sidewalks, and doorsteps.

Our efforts were opposed by the current District Attorney's Office and the American Civil Liberties Union. However, we did succeed, and the law was passed.

We hope in your deliberations you will encourage the new district attorney, Judge Harris, to cooperate with the police department in the implementation of this, what we consider to be landmark legislation.

Mr. Chairman, our community is under seige by drugdealers, and our residents fear for their security and even their lives. They hardly dare to approach drugdealer-infested street corners during the day and never at night, because violence and killing have become commonplace.

Allowing this violation of law to continue is the height of immorality by government and reflects a breakdown in the commitment and duty that government has to its nonviolent, non-drug-pushing citizenry, it is simply wrong.

I have been politically active in liberal causes since 1960, and as an attorney I have defended clients against unconstitutional search and seizure and arrest. I continue to support those constitutionally protected rights for the individual, but it is now evident that in our effort to protect the individual against police and prosecutorial abuses we have painted ourselves into the corner of allowing government to be used and subverted by the criminal element in their war against us. They hold us hostage by our own contrivance. That must end.

The Washington Star of May 27, 1981, carried a column by James Reston, who quoted with approval the following language from an address delivered by Chief Justice Burger:

> The proud American boast that we are the most civilized, most prosperous, most peace-loving people leaves a bitter aftertaste. We are prosperous. We are, and have been, peace-loving in our relations with other nations, but, like it or not, today here at home we are approaching the status of an impotent society—a society whose capability of maintaining elementary security on the streets, in schools, and in the homes of our people is in doubt.
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> For the past 10 years, many of our national leaders and those of other countries have spoken of international terrorism. But our rate of routine, day-to-day terrorism in almost any large city of the United States exceeds the casualties of all the reported international terrorists in any given year. Why do we show such indignation over alien terrorists and such tolerance for our own murderers at home?
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> To concentrate on domestic crime would be costly and controversial, a "damage control problem," but less costly than the billions of dollars and thousands of blighted lives now hostage to crime in this country.

I endorse and support those sentiments expressed by the Chief Justice and by Mr. Reston. We have created a cancer in our midst that threatens our continuation as a free society.

As one who has been in the mainstream of liberal thought and politics for the past 20 years, I am prepared to acknowledge that the traditional liberal approach has simply failed. It is time that we broke with the concepts of the 1960's and the 1970's and developed an agenda with reordered priorities. We must recognize and come to grips with the urgency of our crisis.

The vast majority of this city's citizens are now held hostage by a tiny group of outlaws, urban savages if you will, whose rights have been elevated by current philosophy to heights never contemplated when this country was founded and our government of laws was created.

The district attorney whom you confirm will have the power to strike back lawfully on our behalf against this tyranny. Our new antidrug solicitation legislation will provide him with an immediate means of informing street criminals that street crime will be prosecuted with vigor.

I am convinced, from what I have heard here today from the judge's testimony and from what I know of and have heard of the judge, that he will share and does share our commitment to protect the civil liberties of all citizens.

I appreciate this opportunity to appear on behalf of our association. I was requested by Councilman Wilson to express to you his support of my remarks. Thank you, Mr. Chairman.

The **Chairman**. Mr. Drake, I notice you say here that:

> As one who has been in the mainstream of liberal thought and politics for the past 20 years, I am prepared to acknowledge that the traditional liberal approach has simply failed. It is time that we broke with the concepts of the 1960's and 1970's and developed an agenda with reordered priorities. We must recognize and come to grips with the urgency of our crisis.

It is your feeling that to protect society today, to protect the citizens of this city and other places, we must be more vigilant in the matter of law enforcement, is it not?

Mr. **Drake**. Yes, Senator, it is.

The **Chairman**. Do you have any particular recommendation that you would make, that would help to accomplish this?

Mr. **Drake**. Mr. Chairman, I appreciated the questions that you directed to Judge Harris regarding bail reform. It is my belief, and I think it is the belief of the citizens in the community for which I speak—again, both white and black, poor and affluent—that the continued revolving door of arrest and release on bail simply has to come to an end.

I recognize—as one who in the 1960's and 1970's supported the fight for civil liberties and civil rights, first in the Indiana Legislature in the early 1960's and then in all of the campaigns that Senator Bayh waged in the 1960's and 1970's both at home and nationally, as well as campaigning for Senator Robert Kennedy in 1968, that society must be concerned about the right of the individual; there is no question about that.

But the point is, I think, that like so many efforts of our American society, we simply overreach at times. We look one dimensionally and do not consider the fact that the vast majority of people out there do not have a confrontation with the prosecutor's office or the police, and they are looking to those officers for the protection of their rights. There must, in fact, be a greater balancing than we currently have in the District of Columbia.

The **Chairman**. Some people contend strongly for the rights of individuals to such an extent that the rights of society could be jeopardized. If it came down to the point where you had to protect an individual or protect society as a whole, it would seem to me that you would have to give the paramount protection to society as a whole. How do you feel?

Mr. **Drake**. Mr. Chairman, there has to be a balancing, and we must concern ourselves with substantial justice. The point, however, might best be illustrated by the problem we have at 12th and O in the District where, 18 hours a day, we have at least three drug solicitors standing, who are hawking their drugs. The police tell us that they cannot arrest those people, even though they are known to them and to us as being dealers.

It seems that when there is common knowledge and common recognition that a crime is being committed in our presence, then the larger interests of society must be protected and those people must simply be removed from the streets.

The **Chairman**. Thank you very much, Mr. Drake, for appearing here. We appreciate your coming and giving us your view, especially as one who has watched this situation develop over a number of years and who now feels strongly that we must take action to protect the citizens of this country.

Mr. **Drake**. Yes, sir.

The **Chairman**. Thank you very much.

Mr. **Drake**. Thank you, Mr. Chairman.

[The prepared statement of Mr. Drake and a committee submission follow:]

PREPARED STATEMENT OF RONALD L. DRAKE

I am appearing before you today to acquaint you with the concerns of my community with the prosecutorial philosophy we wish to be reflected by the Office of the District Attorney for the District of Columbia.

My wife and I have lived in the Logan Circle community for almost three years. Like others in that community, we made a commitment to the revitalization of the inner city of our nation's capital, backed that commitment with our financial investment in homes, and with ourselves.

Now, more than any other time since moving to this city, we find our own personal security in jeopardy, our financial investment in doubt, and secure access to our own streets, sidewalks, and parks denied to us by a criminal element that asserts that it has a superior constitutionally protected right to unfettered access to those same streets, sidewalks, and parks, while aggressively denying to us that same right of secure and quiet enjoyment.

I have been witness to a murder, my home has been entered and ripped off, and my friends have been mugged. No one has come forward to champion my constitutional right to security of person and property.

Our neighborhood is the center of unrestricted and open drug solicitation and dealing. Traffic is impeded at street intersections because of cars stopped in the middle of the streets, while the occupants consummate drug transactions with drug dealers. Auto accidents are only narrowly averted in this drug congested scene because those of us who live in the neighborhood and use those streets with our own cars, must stand aside and await the culmination of those illicit drug transactions.

We call for police intervention and are told that under the guidelines of the current District Attorney's Office, a case will not be accepted for prosecution unless it meets a higher standard of proof than our traditional requirement of probable cause. Rather, the current Office has informed my community that a case will not be made unless the prosecutor is convinced beyond a reasonable doubt of the defendant's guilt, thus invading the province of the judge or jury. Further, the Office now requires two police officers to make prostitution arrests.

We call for the police department's Project Burbank and are allotted too little of its time because other parts of the city also demand its services. We inquire about our right to self help and are warned that almost anything we might do to resist this blatant intrusion into our community would be contrary to law. We are advised by the police that we should not challenge these criminal intruders into our neighborhood, because that invites their vengeance.

Many groups in our neighborhood, black and white, affluent and poor, liberal and conservative joined together in support of the passage by the District of Columbia City Council of legislation introduced by Councilman John Wilson, designed to stop drug dealers from hawking their wares on our streets, sidewalks, and doorsteps. We were opposed by the current District Attorney's Office and the American Civil Liberties Union. However, we did secure its passage and it has now been enacted into law. We hope in your deliberations you will encourage the new District Attorney to cooperate with the police department in the implementation of this landmark legislation.

Mr. Chairman, our community is under seige by drug dealers, and our residents fear for their security and even their lives. They hardly dare to approach drug dealer infested street corners during the day, never at night, because violence and killing have become commonplace.

Allowing this violation of law to continue is the height of immorality by government and reflects a breakdown in the commitment and duty that government has to its non-violent, non-drug pushing citizenry. It is simply wrong.

When people first came together to form a society and a government of laws, they relinquished the right to private revenge, retaliation, and in this city the right to own and bear guns for their own protection. In turn, government assumed an absolute social contract with its governed to provide protection against criminal predators, to mete out our privately desired revenge and retaliation through due process, judgment and punishment. Government has the further absolute duty to deny to criminal predators the opportunity to terrorize the law abiding citizenry. This duty of government is shrouded in the mists of antiquity predating our own Constitution, and forms the bedrock on which our Founding Fathers built.

I have been politically active in liberal causes since 1960, and as an attorney, I have defended clients against unconstitutional search and seizure, and arrest. I continue to support those constitutionally protected rights for the individual, but it is now evident that in our effort to protect the individual against police and prosecutorial abuses, we have painted ourselves into the corner of allowing government to be used and subverted by the criminal element in their war against us. They hold us hostage by our own contrivances. That must end.

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1960's and 1970's and developed an agenda with reordered priorities. We must recognize and come to grips with the urgency of our crisis.

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I am convinced by the support that has been expressed for the nominee, that he shares our commitment to protect the civil liberties of all citizens.

THE EIGHTEENTH AND COLUMBIA ROAD BUSINESS ASSOCIATION,
Washington, D.C., December 16, 1981.

Hon. STROM THURMOND,
Chairman, Senate Judiciary Committee,
Washington, D.C.

DEAR SENATOR THURMOND: After discussion with many of our members I want to strongly support President Reagan's nomination of D.C. Appeals Court Judge Stanley S. Harris to be U.S. Attorney for the District of Columbia, and to urge Senate confirmation unanimously at the earliest possible date.

Our members are in business in the inner city area known as Adams Morgan, some have done business here for more than 40 years. Like our customers—some 30,000 shoppers buy in our stores according to the Washingtonian Magazine (Sept. 1981)—All of our members are deeply interested in reduction in crime. Obviously, as U.S. Attorney for the District of Columbia Stanley S. Harris will be able to help reduce crime and make the job of the city's police easier, and the life of businessmen and shoppers and residents and visitors safe in this city.

As you know, the House of Representatives in 1976 and 1977 adopted by an overwhelming majority—once by a unanimous voice vote, and once by a majority of 10 to 1—amendments to improve the D.C. Bail Laws. This legislation was developed by Earl J. Silbert, when he occupied the position of U.S. Attorney for the District of Columbia. I would hope that as U.S. Attorney for the District of Columbia Mr. Harris will continue in the same task of improving the D.C. Bail Laws. This reform legislation developed by Earl Silbert, and which passed the House of Representatives twice, was never adopted by the U.S. Senate. I would urge Mr. Harris to try again and again to get the Silbert Amendments to the D.C. Bail Laws adopted as approved by the House of Representatives in 1977 with an amendment by Rep. Thomas Coleman (R.Mo.).

The need for this legislation is clearly recognized by the Senate Judiciary Committee, as shown by its Report on S. 1722 (Report No. 96-553, 96th Congress, 2d Session, pages 1072-1073) which quotes Senator Kennedy as saying: "With increasing frequency, persons on bail are being arrested and charged with serious felonies—especially burglary, robbery, larceny, and drug offenses. A recent study by the Institute of Law and Social Research found that over fifteen percent of all persons arrested for crimes committed in the District of Columbia were on bail at the time. This arrest rate is over ten times the rate of arrest for the general population."[1] This was from a speech made by Senator Kennedy to the National

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[1] Chief Justice Warren Burger has often spoken of this high arrest rate in D.C.

Governors Conference on Crime Control, June 1, 1979. Clearly, Mr. Harris has his work cut out for him. We wish him the best in his new post and promise to work with him, to our utmost ability.

Respectfully submitted,

J. GEORGE FRAIN, *Secretary*.

The **CHAIRMAN**. If there are no other witnesses, the hearing stands adjourned.

[Whereupon, at 2:45 p.m., the hearing was recessed, subject to the call of the Chair.]

[The following was received for the record.]

BIOGRAPHY

STANLEY S. HARRIS

NOMINEE, U.S. ATTORNEY, DICTRICT OF COLUMBIA

Born: October 19, 1927, Washington, D.C.
Legal residence: District of Columbia.
Marital status: Married to Rebecca Lucille Ashley Harris, three children.
Education: 1951—B.S. University of Virginia; 1953—LL.B. University of Virginia.
Bar: 1953—District of Columbia.
Military service: 1945-47—U.S. Army.
Experience: 1953-70—Hogan and Hartson, Washington, D.C.; 1971-72—judge, Superior Court of the District of Columbia; 1972 to present—judge, District of Columbia Court of Appeals.

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